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Supreme Court, U.S.
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OFFICE OF THE CLERK

UNITED STATES SUPREME COURT
NO. 00M84

GEORGE TRUDEL, JR.
Petitioner

V.
DONALD VAUGHN, SUPERINTENDENT
DISTRICT ATTORNEY OF PHILADELPHIA
ATTORNEY GENERAL OF
PENNSYLVANIA

APPENDIX

On Petition For Writ of Certiorari to the United States Court of Appeals for the Third Circuit, No. 00-1099.

Counsel for Petitioner:

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
C.A. No. 00-1099

GEORGE TRUDEL, JR.
vs.
DONALD VAUGHN, ET AL.

(E.D.PA.CIV.NO.99-CV-02734)

Present: NYGAARD, ALITO and FUENTES, CIRCUIT JUDGES

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. S2253(c)(1); and

(2) Appellees' response in opposition thereto in the above-captioned case.

Respectfully,
Clerk

MMW/LLB

ORDER

The request for a certificate of appealability is denied. Petitioner failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. S 2253(c)(2).

By the Court,

Circuit Judge

Dated:

IN THE UNITED STATE DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

GEORGE TRUDEL, JR. : CIVIL ACTION
v. :
DONALD VAUGHN, et al : NO. 99-2734

ORDER

AND NOW, this Day of , 2001:

1. Petitioner's objections toe the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells are overruled.

2. The Report and Recommendation is approved and adopted.

3. The petition for writ of habeas corpus is denied.

4. A certificate of appealability is denied, as petitioner has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. S2253(c)(2)

BY THE COURT:

/s/______________________
J.

IN THE UNITED STATE DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

GEORGE TRUDEL, JR. : CIVIL ACTION
v. :
DONALD VAUGHN, et al : NO. 99-2734

REPORT AND RECOMMENDATION

CAROL SANDRA MOORE WELLS
December 30, 1999
UNITED STATES MAGISTRATE JUDGE

Presently before this court is a counseled Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. S 2254. George Trudel, Jr. ("Petitioner") currently is incarcerated at the State Correctional Institution at Graterford, Pennsylvania. Petitioner seeks habeas relief based on a claim that he did not knowingly and voluntarily waive his right to testify. The Honorable Robert F. Kelly referred this matter to me for a Report and Recommendation pursuant to 28 U.S.C. S 636(b)(1)(B). For the reasons which follow, it is recommended that Petitioner's procedurally defaulted claim be denied and dismissed without an evidentiary hearing.

I. BACKGROUND AND PROCEDURAL HISTORY.[1]

The facts of the case, as stated by the Pennsylvania Superior Court, follow:

> According to witnesses presented by the Commonwealth, [petitioner] was at a party in his apartment when a man came to the door offering to sell them Valium. The man stated that Casimer Barowiec, the decedent, had the Valium. [Petitioner] and his friends wanted the Valium, but could not afford it. They asked to have the Valium on credit, but the man refused. [Petitioner] returned to the party and said something to the effect of, "Let's go beat this guy up and take his V's [Valium]"
>
> [Petitioner] and a friend, Robert Barrett, left the

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[1] The facts and procedural history were gleaned from Petitioner's Habeas Corpus Petition and Reply Brief, the Commonwealth's Response, inclusive of all exhibits thereto, and the state court record.

> party. They returned shortly thereafter, and Barrett bragged that he had beaten up and stabbed Barowiec. Barrett told people at the party that Barowiec had a knife, which fell on the ground during the fight, and, that [Petitioner] recommended stabbing Barowiec. [Petitioner] then took a board and suggested that they "go down and finish him off." [Petitioner], Barrett, and others found Barowiec lying nearby. Barowiec died later from a stab wound in his chest.[2]

On December 8, 1988, a jury in the Court of Common Pleas, Philadelphia County, convicted Petitioner of second degree murder, criminal conspiracy, and possessing an instrument of crime.[3] On April 18, 1989, the Honorable David N. Savitt, who had presided at trial, denied Petitioner's post-verdict motions and sentenced him to a mandatory term of life imprisonment for second degree murder and a concurrent prison sentence of one to two years for possessing an instrument of crime.[4] Judge Savitt suspended the sentence for criminal conspiracy.[5]

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[2] Commonwealth v. Trudel, No. 01203 Philadelphia 1989 at 1-2 (Pa.Super.January 10, 1990) footnote omitted).

[3] See Answer at 1.

Petitioner filed an appeal from the trial court judgment in the Superior Court of Pennsylvania. The claims asserted therein were that 1) the evidence was insufficient to support a second degree murder conviction; 2) Petitioner's out-of-court statements were insufficient to support a conviction without independent evidence; 3) the trial court erred in admitting out-of-court statements of co-Defendant; 4) trial court erred in failing to define justification in the context of its voluntary manslaughter charge; 5) trial court erred in refusing to admit a psychological assessment relating to the Commonwealth's chief witness; and 6) the trial court erred in extending the time for trial under Pa.R.Crim.P.1100[6]. The Superior Court of Pennsylvania affirmed the trail court judgment in a memorandum opinion filed January 10, 1990.[7] On February 28, 1990, the Superior Court denied Petitioner's application requesting reargument or reconsideration of its decision.

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[4] *Id.*

[5] *Id.*

On March 27, 1990, Petitioner appealed to the Supreme Court of Pennsylvania, arguing that the Superior Court erred in (1) finding the lower court's charge to the jury accurately and adequately reflected the law of unreasonable belief voluntary manslaughter; (2) finding that certain documents were not statements by the witness, did not contradict the witness' testimony, and lacked probative value; and (3) finding that the trial court did not abuse its discretion in ruling that the chief Commonwealth witness could testify as to out-of-court statements, purportedly made by a codefendant, which were not made in the course of or in furtherance of a conspiracy.[8] The Supreme Court denied allowance of appeal on October 23, 1990.[9]

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[6] *See Commonwealth v. Trudel* No. 01203 Philadelphia 1989, slip op. At 2-6 (Pa.Super.Jan.10, 1990)

[7] *Id.* at 7.

Petitioner, represented by new counsel, filed a petition for collateral review under Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa.C.S. S9541, *et seq.* On September 1, 1992, wherein he contended that "(1) trial counsel was ineffective for depriving the [Petitioner] of his right to testify on his own behalf; and (2) trial counsel was ineffective for failing to call Sophie Martin, the [Petitioner's] grandmother, to the stand at trial."[10] The Honorable Joseph I. Papalini denied the PCRA petition on May 26, 1995;[11]however, the Superior Court vacated this judgment and remanded the matter for an evidenciary hearing to determine whether Petitioner was denied his right to testify at trial.[12] After a hearing, Judge Papalini found that trial counsel adequately informed Petitioner of his right to testify; he, therefore, denied the PCRA petition a second time on March 10, 1997.[13]

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[8] *Id.* at 3.

[9] *See* Answer at 2.

Petitioner filed an appeal of the denial of his

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[10] *Commonwealth v. Trudel*, No. 2299 Philadelphia 1987, slip op. at 3 (C.C.P. Philadelphia County March 10, 1997).

[11] *See* Answer at 2.

[12] *Commonwealth v. Trudel*, 685 A.2d 1048 (Pa. Super1996)(table).

[13] *Commonwealth v. Trudel,* No. 2299 Philadelphia 1987, slip op. at 11 (C.C.P. Philadelphia County March 10, 1997).

PCRA petition in the Superior Court of Pennsylvania on the ground that trial counsel was ineffective for failing to ensure that Petitioner knowingly and voluntarily waived his right to testify.[14] The Superior Court affirmed the order of the PCRA court on June 2, 1998.[15]

Petitioner's appeal to the Supreme Court of Pennsylvania asserted that there was insufficient evidence in the record to establish that he knowingly and voluntarily waived his constitutional right to testify in his own defense.[16] He contended that, because the constitutional right to testify is a fundamental right, the lower courts should have required that the trial court record expressly reflect a valid and knowing waiver of the right.[17] Petitioner argued that mere assumption, supposition, or presumption cannot adequately establish a valid waiver.[18] He further stated that the lower courts erred in applying an ineffective assistance of counsel analysis to his claim concerning denial of his right to testify."[19] The Supreme Court denied allocatur on December 23, 1998.[20]

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[14] *Commonwealth v. Trudel*, No. 1478 Philadelphia 1997, slip op. at 2 (Pa.Super.June 2, 1998)

[15] *Id.* at 6.

[16] *See* Answer at 3-4.

On April 28, 199, Petitioner filed the within habeas petition asserting the "[he] did not knowingly and voluntarily waive his right to testify."[21] The

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[17] *Id.*

[18] *See Petitioner's Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, June 25, 1988.*

[19] *Id.*

[20] *Commonwealth v. Trudel,* No. 314E.D. Allocatur Docket 1998

[21] *See* Petition at 7.

Commonwealth asserts, and this court agrees, that Petitioner's claim is procedurally defaulted.[22]

II. DISCUSSION

A. Exhaustion

A Petition for habeas corpus is a final effort to obtain relief when other legal remedies are foreclosed. Therefore, a district court may consider and grant habeas corpus relief only if Petitioner meets his burden of proving that he has exhausted all state remedies available to him with respect to each discrete allegation or is excused from doing so. 28 U.S.C. S2254(b),[23] *Rose v.*

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[22] *See* Answer at 10.

[23] The exhaustion requirements of 28 U.S.C. S 2254 provide: (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that (A) the applicant has exhausted the remedies available in the courts of the State; or
(b)(i) there is an absence of available State corrective process; or
(ii) circumstances exist that render such process inef-

Lundy, 455 U.S. 509, 519 (1982); Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993), aff'd 30 F.3d 1488 (3d Cir. 1994)(citations omitted). A claim is exhausted if it has been "fairly presented" once to the state's trial court, intermediate appellate court, and highest court. 29U.S.C. S 2254(b); *Evans v. Court of Common Pleas, Delaware County, Pennsylvania*, 959 F.2d 1227, 1230-31 (3d Cir. 1992) (citing Picard v. Conner, 404 U.S. 270, 275 (1971)). The fair presentation requirement is met when the claim presented in the state court is the "substantial equivalent" of the claim asserted in the petitioner's federal habeas petition. *Picard*, 404 U.S. at 278. See Lesko v. Owens, 881 F.2d 44, 50 (3d Cir. 1989) *(citing*

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fective to protect the rights of the applicant...
(c) an applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any availability procedure, the question presented.

Picard), cert. denied 110 S.Ct. 759 (1990); Bisaccia v. Atty. Gen. Of New Jersey; 623 F.2d 307, 310 (3d Cir. 1980) (*quoting Picard*), *cert. denied* 101 S.Ct.622 (1980). "It is not enough that all the facts necessary to support the federal claim were before the state courts...of that a somewhat similar...claim was made." *Anderson v. Harless*, 459 U.S.4,6(1982). For purposes of exhaustion, it is not necessary that the state court rule on the merits of the claim(s) presented to it. *See Sullivan v. Cuyler*, 723 F.2d 1077, 1082 (3d Cir. 1983); *Gonce v. Redman*, 780 F.2d333.336(3d Cir. 1985). If a direct appeal has been aborted, but collateral review is possible, then the exhaustion requirement has not been met. 29 U.S.C. S 2254(c).

In the instant petition, the sole claim presented for review was not "fairly presented" in all levels of the state courts. Petitioner did not present his Sixth

Amendment claim at any level of direct appeal. Moreover, he did not initially raise this issue during collateral review, pursuant to the PCRA. Although, at the PCRA and Superior Court levels. Petitioner raised a related ineffective assistance of counsel claim, he first argued that there was insufficient evidence on the record to establish that he knowingly and voluntarily waived his right to testify upon appeal of the PCRA denial to the state's highest court. Therefore, the issue presented in this habeas petition is unexhausted.

B. Procedural Default

Generally, a Petitioner must return to the state courts to present the unexhausted claim for collateral review before he can obtain federal habeas review. *Rose*. 455 U.S. at 52. However, this federal habeas court may excuse Petitioner's failure to exhaust his claim if state court review is now "clearly foreclosed". *See Doctor v.*

Walters. 96 F.3d 675. (3d Cir. 1996) and *Peterson v. Brennan*, 1998 WL470139.*4 (E.D. Pa.) (both *citing Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993). A petitioner's return to state court would be "futile" when a state procedural bar "clearly foreclose[s] state court review of the unexhausted claims." If there is any uncertainty as to how a state court would resolve a procedural default issue, [a federal court] should dismiss the petition for failure to exhaust..." *Peterson*, 1998 WL47-139.*4 (*citing Doctor v. Walters*, 96 F.3d 675, 681 (3d Cir. 1996)(*quoting Toulson*, 987F.2d 984, 987)).

The crucial question, then, is whether it remains procedurally possible for Petitioner to present his unexhausted federal claim to Pennsylvania state courts. The Government argues that Petitioner's claim regarding his right to testify is procedurally defaulted because

Petitioner failed to timely present it in state court.[24] Based upon requirements of the PCRA, this Court agrees that collateral attack in state court is now clearly foreclosed by a time bar or waiver.

a. Statute of Limitations

The PCRA requires that all petitions be filed "within one year of the date the judgment becomes final...."42 Pa.C.S.A.§ 9545(b)(1). A judgment is deemed final, for purposes of t the PCRA, "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." *Peterson* 1998 WL470139 at *5 (*citing* 42 Pa.C.S.A.§9545(b)(3)). The Pennsylvania Supreme Court denied Petitioner's request for allowance of appeal on October 23, 1990. Therefore, pursuant to the 1995 amendment to 42 Pa.C.S.A. §9542, Petitioner had until December 22, 1990[25], to file a timely PCRA petition in state court. The Pennsylvania Supreme Court has strictly and without deviation enforced this newly adopted limitation period. *See e.g. Comm. V. Fany, 737 A.2d. 214 (Pa. 1999)*. Thus, dismissal to return to state court to exhaust the claim would be futile.

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[24] *See* Answer, p.9-10.

b. PCRA's Waiver Requirement

Moreover, to obtain collateral review, Petitioner must demonstrate to the state PCRA court that 1) the claim has not been previously litigated or waived and 2) previous failure to raise the issue was not the result of any rational, strategic, or tactical decision by counsel. 42Pa.C.S.§9543(a)(3),(4). An issue is previously litigated if "the highest appellate court in which the petitioner could have obtained review as a matter of right has ruled on the merits of the issue" or "it has been raised and decided in a proceeding collaterally attacking conviction or sentence." 42Pa.C.S.§9544(a)(2) and (3) Further, "an issue may not be relitigated merely because a new or different theory is posited as a basis for reexamining an issue that has already been decided." *Commonwealth v. Tenner*, 377 Pa.Super.540, 547 A.2d 1194, 1197 (1988), *appeal denied*, 562 A.2d 826 (Pa. 1989). An issue is deemed waived if "petitioner could have raised it but failed to do so before trail, at trial, during unitary review, on appeal or in a prior state post-conviction proceeding." 42Pa.C.S.§ 9544(b)

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[25] Petitioner had sixty (60) days to seek direct review of his conviction to the United States Supreme Court after allocatur was denied. 42Pa.C.S.A.§9545(b)(3).

Petitioner failed to present his federal claim of violation of his right to testify on direct appeal.[26]He also failed to raise it at the first two levels of collateral review. Since this issue was known during and after trial it previously could have been raised and is, by the foregoing definition, waived. Moreover, identical facts were germane to resolution of the ineffective assistance of counsel claim that was previously present to Pennsylvania's highest appellate court. Pennsylvania State Courts will not revisit a claim previously rejected merely because a new theory of relief has been advanced. 42Pa.C.S. §§9543(a)(3), 9544(a); *Commonwealth v. Christy*, 656 A.2d877, 881 (Pa. 1995), *cert. denied*, 516 U.S. 872 (1995). Couched as ineffective assistance or as a direct denial of his right to testify claim, the state courts, after a full hearing, ruled on the merits of

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[26] Nor does Petitioner qualify for any exception to permit him to successfully institute an untimely second PCRA action. The PCRA bars any petition no filed

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within one year of the date on which the challenged judgment becomes final. 42Pa.C.S.§9545(b)(1).

Petitioner's claim.[27] Hence, Petitioner's habeas issue is both waived and previously litigated and state court collateral review is clearly foreclosed, rendering Petitioner's federal claim procedurally defaulted.

c. Relief from Procedural Default Petitioner's Habeas.

This court must dismiss a procedurally defaulted claim unless Petitioner demonstrates both "cause" for the default *and* "actual prejudice as a result of the alleged violation of federal law," or that failure to consider the claim will result in a "fundamental miscarriage of justice" which has been defined to encompass instances in which newly discovered evidence makes it "more likely than not" that a reasonable juror would find a Petitioner not guilty. *Coleman*, 501 U.S.at 750, *Schlup v. Delo*, 513 U.S. 298(1995); *see also. Caswell v. Ryan*, 953 F.2d853, 8567 (3d Cir. 1992), *cert. denied,* 504 U.S. 944 (1992)

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[27] "We find that counsel did not interfere with Petitioner's right to testify and he certainly did not prohibit him from taking the witness stand in his own defense. We find instead that after the presentation of defense testimony, [trial counsel] advised Petitioner not to testify and that Petitioner relied on that advice."*Commonwealth v. Trudel* No. 2299 Philadelphia 1987, slip op. at 8(C.C.P. Philadelphia County, March 10, 1997).

"Cause" sufficient to excuse procedural default requires a showing that some objective factor, outside of counsel or Petitioner's control, prevented compliance with state procedural rules. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Caswell*, 953 F.2d at 862. "Actual prejudice" occurred if an error caused the "actual and substantial disadvantage" of petitioner. *U.S. v. Frady*, 456 U.S.152, 179 (1972). The burden of proof falls on Petitioner to establish both cause for the default and prejudice resulting therefrom. *See Teague v. Lane*, 489 U.S. 288, 298 (1989); *Coleman,* 501 U.S. at 754; *Caswell*, 953 F.2d at 862.

Petitioner offers no explanation for his failure to pursue the right to testify claim through all levels of the state court system. He does argue, however, that the PCRA court and Superior Court erred in evaluating his claims under the ineffective assistance of counsel analysis. His failure to correct this "misconstruction"[28]is not attributable to any factor outside his or his counsel's control, thus the record is devoid of "cause" for his failure to timely argue the claim sub judice. He knew both during trial and upon direct appeal that he wanted to testify but had not done so. When the factual basis of a delayed claim is not based upon newly acquired evidence, no factor outside of Petitioner himself occasioned the failure to timely pursue same.

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[28] Despite Petitioner's argument to the contrary, the lower courts did not err in analyzing his claims under the guise of ineffective assistance of counsel. In fact, a claim that defendant's right to testify was violated by counsel must be evaluated as ineffective assistance of counsel theory under *Strickland, See United States v. Teague*, 953 F.2d 1525.

Moreover, Petitioner offers no newly discovered evidence which would effect a "fundamental miscarriage of justice" if his Sixth Amendment issue were not considered by this Court. As nothing in the record justifies excusing the procedural default, this Court must bar habeas review of this claim.[29]

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[29] Even if Petitioner's claim were not procedurally defaulted, he would not be entitled to habeas relief. When Petitioner appealed denial of his PCRA petition, the Superior Court of Pennsylvania remanded the matter to the PCRA court for an evidentiary hearing to determine whether, in fact, trail counsel had informed Petitioner of his right to testify. Testimony at the hearing, at which Petitioner and his former counsel testified, revealed that trial counsel and Petitioner met on several occasions and had two telephonic conversations to discuss case strategy. In addition, the trial court, on the record and with Petitioner present, informed the jury with Petitioner present before trial commenced that the decision to testify was Petitioner's alone. Furthermore, trial counsel testified that his current practice is to inform clients that the decision to testify rests with them and he believes that, at the time that he counseled Petitioner, he was aware of that fact. After the hearing, the PCRA Court found as a matter of fact that the trial counsel had properly

Accordingly, I make the following:

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informed Petitioner of his right to testify and, in following counsel's advice, Petitioner, of his own free will, opted to remain silent. Therefore, the court concluded that trial counsel was not ineffective. This factual determination by the state court is presumptively correct and Petitioner has failed to rebut the presumption with "clear and convincing evidence" 28 U.S.C. 2254(e)(1). Consequently, this court would accept that finding as true since it is reasonably based, is not contrary to Supreme Court precedent and is not an unreasonable application of any such law. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 891 (3d Cir. 199).

RECOMMENDATION

AND NOW, this 30th day of December, 1999, for the reasons contained in the foregoing report, it is hereby RECOMMENDED that the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 be DENIED and DISMISSED without an evidentiary hearing. Petitioner has failed to make a showing of a denial of a constitutional right. Thus, there is no probably cause to issue a certificate of appealability.

BY THE COURT:

/s/ Carol Sandra Moore Wells
CAROL SANDRA MOORE WELLS
UNITED STATE MAGISTRATE JUDGE

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

GEORGE TRUDEL, JR.

NOS. 2299-2302

Aug. - 1987

DEFENDANT'S PETITION FOR POST CONVICTION RELIEF PURSUANT TO RULE 1501 AND 42 Pa.C.S.A. SECTION 9541 ET. SEQ.

F. KIRK ADAMS, ESQUIRE
Counsel for Defendant
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Attorney I.D. #03733

COMMONWEALTH : COURT OF COMMON
OF : PLEAS
PENNSYLVANIA : PHILADELPHIA COUNTY
vs. : CRIMINAL DIVISION
GEORGE TRUDEL, JR.: NOS. 2299-2302

DEFENDANT'S PETITION FOR POST CONVICTION RELIEF PURSUANT TO RULE 1501 AND 42 Pa.C.S.A. SECTION 9541 ET. SEQ.

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The defendant, George Trudel, Jr., by his attorney, F. Kirk Adams, Esquire, moves the court for post-conviction collateral relief pursuant to Rule 1501 of the Rules of Criminal Procedure:

1. The defendant's name is George Trudel, Jr.
2. The defendant is confined in the State Correctional Institution at Graterford.
3. The defendant was convicted and sentenced for murder in the second degree, criminal conspiracy and possession of an instrument of crime.

4. The defendant was initially sentenced on December 8, 1988 immediately after a jury found him guilty of second degree murder, criminal conspiracy and possession of an instrument of crime. Judgment of sentence was formally entered on or about April 18, 1989 after the court denied the defendant's post-trial motions.

5. The defendant was convicted by a jury.

6. The court imposed the following sentences: On bill of information No. 2301, August Term, 1987, second degree murder, life imprisonment; on bill of information No. 2300, August Term 1987, criminal conspiracy, sentence suspended; on bill of information No. 2299, August Term, 1987, possession of an instrument of crime, two years of imprisonment to run concurrently with the sentence of life imprisonment on Bill No. 2301. The defendant is serving these sentences

now.

7. The judge who presided over the jury trial and who sentenced the defendant is the Honorable David N. Savitt.

8. The defendant filed an appeal in the Superior Court of Pennsylvania, No. 1203 PHL-89. The Superior Court affirmed the judgment of the Court of Common Pleas of Philadelphia County on January 10, 1990. The defendant's request for reargument was denied on February 28, 1990. The defendant's petition for allowance of appeal to the Supreme Court of Pennsylvania was denied on October 23, 1990. The defendant has never filed a federal action seeking post-conviction relief. All of the defendant's direct appeals have been completed.

9. The defendant was represented by George Henry Newman, Esquire: Suite 400, The Benjamin

Franklin, 834 Chestnut Street, Philadelphia, Pa., 19107 from his arraignment until the denial of his petition for allowance of appeal by the Supreme Court of Pennsylvania on October 23, 1990.

10. The defendant requests discharge by arrest of judgment or, in the alternative, a new trial.

11. The grounds for the relief requested are as follows:

(a) The defendant was deprived of his Constitutional right to testify in his own defense by counsel's decision not to call him as a witness at trial.

(b) The defendant was denied effective assistance of counsel as follows:

(1) Counsel failed to call Sophie Martin as a trial witness despite her availability, willingness to testify and exculpatory testimony.

(2) At counsel's request no

transcripts were made of hearings held on the Rule 1100 issue depriving the defendant of appellate review of this court's rulings on Rule 1100 and/or counsel failed to preserve defendant's rights under Rule 1100 by failing to file a timely Motion to dismiss.

(c) The Commonwealth's prosecution of the defendant was vindictive in violation of the defendant's right to due process of law guaranteed by the United States Constitution and the Constitution of the Commonwealth of Pennsylvania. The defendant was prosecuted to punish him for testifying on behalf of Robert Barrett at Barrett's trial.

(d) The commencement of trial on November 28, 1988 violated Rule 1100 and deprived the defendant of his right to a speedy trial guaranteed by the United States Constitution and the Constitution of the Commonwealth of Pennsylvania.

12. The factors supporting each such ground which;

(a) appear in the record, can be found in the trail transcript insofar as it shows that neither the defendant nor Sophie Martin testified at defendant's trial. Furthermore, the docket entries support the defendant's Rule 1100 claim and the Memorandum opinion of the Superior Court of Pennsylvania in Commonwealth v. Trudel, No. 01203 PHL 89, filed January 10, 1990, page 7. supports the defendant's claim that counsel's failure to request a record deprived the defendant of appellate review of the Rule 1100 issue.

(b) do not appear in the record, can be found in the Affidavits of Sophie Martin and George Trudel, Jr. which are attached and the Notes of Testimony from the trial of Robert Barrett, Commonwealth v. Robert Barrett, Nos. 2305 - 2307, December Term, 1987, as follows: Testimony of George Trudel, Jr. on July 21, 1987, pages 154 to 200 inclusive and Testimony of Sophie Martin on July 20, 1987, pages 132 to 151 inclusive. Testimony of George Trudel, Jr. at Robert Barrett's preliminary hearing on December 10, 1986, pages 3 to 16.

13. None of the grounds for the relief requested were raised before, except the alleged violation of Rule 1100 which was raised in this Honorable Court by defendant's objection to the Commonwealth's motions for extension of Rule 1100 and the defendant's post-verdict motions. The defendant's Rule 1100 issue was raised in the defendant's direct appeal to the Superior Court of Pennsylvania.

14. The defendant's conviction resulted from a violation of the Constitution of Pennsylvania and the Constitution of the United States which so undermined

the truth determining process that no reliable adjudication of guilt or innocence could have taken place.

15. Furthermore the defendant's conviction resulted from ineffective assistance of counsel which so undermined the truth determining process that no reliable adjudication of guilt or innocense could have taken place.

16. The defendant's conviction violated the 5th Amendment of the United States Constitution since the prosecution was carried out to punish the defendant for testimony as a defense witness at the trial of Robert Barrett.

17. The allegations raised in this petition have not been previously litigated and all of the following apply:

(a) The issues raised in this petition have not been waived.

(b) If the issues raised have been waived the alleged error has resulted in the conviction of an innocent individual.

(c) If the issues have been waived the waiver of those issues during pre-trial, trial, post-trial or direct appeal proceedings does not constitute a state procedural default barring federal habeas corpus relief.

18. The Commonwealth has not been prejudiced either in it's ability to respond to this petition or in it's ability to re-try the petitioner.

WHEREFORE, the defendant, George Trudel, Jr., prays that your Honorable Court will enter an order scheduling a hearing to receive testimony and other evidence relevant to defendant's motion and that thereafter your Honorable Court will enter an order setting aside the defendant's conviction of second degree murder, criminal conspiracy and possession of instrument of crime and granting defendant's discharge and/or a new trial.

Date: September 1, 1992

/s/ F. Kirk Adams, Esquire
F. Kirk Adams,Esquire
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Attorney I.D. #03733

IN THE SUPERIOR COURT
OF PENNSYLVANIA

COMMONWEALTH	:	
OF PENNSYLVANIA	:	NO. 01478 PHL 97
	:	
vs.	:	
	:	
GEORGE TRUDEL, JR.,	:	
Appellant		

BRIEF OF THE APPELLANT

In the appeal from the Order of March 10, 1997 denying Appellant's petition for Post Conviction Relief entered by the Court of Common Pleas of Philadelphia County, Criminal Division, in Commonwealth v. George Trudel, Jr., No. 8708-2299.

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STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction to review the decision of the trial court pursuant to 42 Pa. C.S.A. Section 742.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

In reviewing a post conviction court's grant or denial of relief, the Superior Court's scope of review is limited to determining whether the lower court's findings are supported by the record and whether it's order is otherwise free of legal error. Commonwealth v. McCord, 644 A.2d 1206 (Pa. Super. 1994).

ORDER IN QUESTION

ORDER

AND NOW, this 10th day of March, 1997, after a review of the pleadings, record, evidence and argument of counsel, it is hereby ORDERED AND DECREED that post conviction relief is DENIED.

BY THE COURT:

/s/ Papalini, J.
PAPALINI, J.

STATEMENT OF QUESTIONS INVOLVED

1. Did the defendant make a knowing and voluntary waiver of his Constitution right to testify at his trial?

(Answered in the affirmative by the Court below).

2. Was counsel ineffective for failing to ensure that the defendant's waiver of his right to testify was knowing and voluntary?

(Answered in the negative by the Court below).

3. Did the waiver of the defendant's right to testify by counsel and the ineffective assistance of counsel in that regard, undermine the truth determining process of the trial and prejudice the defendant?

(Answered in the negative by the Court below).

STATEMENT OF THE CASE

Procedural History:

On December 8, 1988 the defendant was found guilty by a Jury of Murder in the Second Degree, Criminal conspiracy and Possession of an Instrument of Crime, in connection with the death of Casimir Baroweic on November 14, 1986.

The defendant was sentenced to life imprisonment for his conviction of Second Degree Murder and two (2) years imprisonment for his conviction of possession of an instrument of crime.

The Honorable, David H. Savitt, presided over the defendant's trial and sentenced the defendant on April 18, 1989.

The defendant filed an appeal in the Superior Court of Pennsylvania, No. 1203 PHL 89. The Superior Court affirmed the judgment of the Court of Common Pleas on January 10, 1990. The defendant's request for reargument was denied on February 28, 1990 and the defendant's petition for allowance of appeal was denied by the Supreme Court on October 23, 1990.

The defendant was represented by George H. Newman, Esquire, at trial and during his direct appeals.

On September 1, 1992, the defendant filed a petition for post conviction relief on the grounds that he was deprived of his Constitutional right to testify and was denied effective assistance of counsel because counsel failed to call the defendant's grandmother to testify at trial.

On June 24, 1993, the Court below held a special evidentiary hearing to receive the testimony of the defendant's elderly grandmother.

On May 26, 1995, the court entered an order denying the defendant's petition for post conviction relief.

The defendant appealed to the Superior Court in No. 2330 PHL 95.

On August 16, 1996, this Honorable Court vacated the judgment of the court below and remanded for an evidentiary hearing on the issue of defendant's claim that he was deprived of his right to testify.

On March 10, 1997 the Court below entered an order denying the defendant's petition for post conviction relief.

This appeal was filed on April 2, 1997.

Relevant Facts:

On November 14, 1986, at approximately 11:00 PM, Philadelphia Police Officers found the body of Casimir Baroweic lying in the street at the intersection of Unity and Griscom Streets (N.T., 12-16-88, pp. 34 to 36). It was determined that Baroweic died as a result of a stab wound of the chest. (N.T., 12-6-88, p. 89).

The Commonwealth's evidence at trial revealed that the defendant, his friends, Robert Barrett, Colleen DeMarco and Jackie Young were at a party in the second floor apartment at 4436 Griscom Street during the evening hours on November 14, 1986.

At approximately 10:00 PM, Art Jones came to the first floor door of 4436 Griscom. Jones was known to Barrett and the defendant. Jones offered to sell Barrett and the defendant Valium pills. Barrett wanted to buy some pills on credit but Jones wanted cash. Jones told Barrett and the defendant that Casimer Baroweic was waiting about a block away with more Valium pills. (N.T., 12-6-88, pp. 52 to 69).

According to Colleen DeMarco, the defendant and Barrett talked about beating up a guy who was outside and taking some Valium pills from him.

Barrett and the defendant left the apartment. When they returned a short time later, they told DeMarco and Young that Barrett stabbed a man with a knife which the man dropped during a fist fight with Barrett. The defendant suggested going outside to "finish him off" and the defendant, Barrett, DeMarco and

Young went out of the house and saw Baroweic lying in the street. DeMarco went to a nearby store to call the police and the others returned to 4436 Griscom Street (N.T., 12-6-88, pp. 105 to 131, 192, 193); (N.T., 12-7-88, pp. 243 to 250).

Robert Barrett testified for the defendant and explained that he was serving a sentence of seven (7) to fifteen (15) years imprisonment for his conviction of Third Degree Murder as a result of the stabbing of Baroweic. Barrett confirmed that Art Jones came to 4436 Griscom Street on November 14, 1986 and tried to sell him Valium pills. After talking with Jones and not buying the pills, Barrett walked to a nearby store to buy cigarettes. When he was returning to 4436 Griscom Street, he was confronted by Baroweic, who was looking for Jones. Baroweic tried to punch Barrett when Barrett didn't answer his questions about the whereabouts of Art

Jones. Barrett defended himself and a fist fight started between the two men. At some point a large knife fell out of Baroweic's clothing. Both men attempted to pick up the knife and a struggle took place over control of the knife. During this struggle, Barrett forced Baroweic to stab himself with his own knife. Baroweic dropped the knife and ran up Griscom Street towards Unity Street. During the fist fight with Baroweic, Barrett heard the defendant's voice yelling to him, "Don't be crazy Bob". After Baroweic went up Griscom Street, Barrett and the defendant returned to the apartment. A short time later, Barrett and the defendant went outside and saw Baroweic lying in the street at Griscom and Unity. Barrett was frightened and went home after throwing the knife onto nearby railroad tracks. (N.T., 12-7-88, pp. 374 to 420, 424 to 427).

The trial record reveals that the defendant did not testify at his trial. The trial record does not reveal how that decision was made or who made that decision.

The defendant and his former attorney, George Newman, Esquire, testified at an evidentiary hearing on January 30, 1997.

The defendant said he wanted to testify, told his lawyer he wanted to testify and expected to testify until the end of his trial when his lawyer told him, "I'm not going to put you on the stand". (73a., 74a., 75a., 76a., 88a., 96a., 97a., 98a., 101a.). Newman told the defendant he did not think the defendant's testimony was necessary, he did not think the jury would believe Colleen DeMarco and he would cover everything in his closing. (74a.). This brief conversation took place at counsel table while the trial was in progress. (75a.). The defendant said nothing in response because he trusted his lawyer's judgment, believed his lawyer had the authority to make that decision and did not know he could overrule his lawyer. (75a., 76a., 88a., 101a., 102a.).

Although the defendant had some prior experience with the Criminal Justice System, he was never told by Mr. Newman or any other lawyer that the decision whether or not he would testify was a decision he had to make himself. (75a., 76a., 79a., 88a.).

George Newman, Esquire, testified that he had no recollection of the specifics of any of his conversation with the defendant regarding the defendant testifying. (20a.). He did recall that he was opposed to the defendant testifying as a matter of strategy. (20a.). Newman was aware that the defendant had testified at Barrett's trial and Barrett's preliminary hearing and had given the police two (2) written statements concerning the events of November 14, 1986. (19a., 26a.).

Although Newman had represented the defendant in several criminal cases before this case, he had no recollection of ever telling the defendant that the decision whether or not the defendant would testify was up to the defendant himself. (29a., 30a.). Furthermore, he could not say what his general practice was in 1988. (36a., 43a.). In addition, Newman could not say whether the defendant acquiesced in counsel's decision not to put him on the stand, or whether the defendant made his own affirmative decision not to testify on the basis of Newman's recommendation. (40a., 38a., 45a.).

SUMMARY OF APPELLANT'S ARGUMENT

1. The defendant's right to testify in a criminal trial is a fundamental Constitutional right which can only be waived by the defendant. Furthermore, a waiver of such a right must be knowing and voluntary and must involve an intentional relinquishment or abandonment of

a known right or privilege.

In this case the testimony of the defendant and his former lawyer established that the defendant did not make a knowing and voluntary waiver of his right to testify.

The defendant wanted to testify and expected to testify until the end of his trial when his lawyer told him, "I'm not going to put you on the stand". The defendant said nothing in response and acquiesced in counsel's decision because he trusted his lawyer's judgment, believed his lawyer had the authority to make that decision and didn't know he could overrule his lawyer.

Therefore the defendant's waiver of his right to testify was not knowing and voluntary and as a result the defendant was deprived of a fundamental Constitutional right.

2. Furthermore, counsel was ineffective for failing to ensure that the defendant's waiver of his Constitutional right to testify was personal, knowing and voluntary. Counsel has a professional obligation to make sure a defendant who is considering a waiver of his right to testify understands that the decision whether or not to testify is a decision that must be made by the defendant himself.

In this case, counsel had no recollection of what he said to the defendant regarding his right to testify or the decision whether or not he would testify. Furthermore, counsel was unable to say what his general practice was in 1988.

3. The defendant contends the waiver of his right to testify by counsel and the ineffective assistance he received from counsel in regard to that waiver undermined the trust determining process and prejudiced

him. The defendant wanted to testify and expected to testify. Therefore it is fair to conclude that he would have testified but for counsel's waiver of his right to testify.

Furthermore, the defendant's testimony would have been exculpatory and consistent with Robert Barrett's testimony. If the jury had heard the defendant's testimony and believed the defendant, their verdict would have been different.

APPELLANT'S ARGUMENT

1. THE DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO TESTIFY WHEN HE MADE AN UNKNOWING OR INVOLUNTARY WAIVER OF HIS RIGHT TO TESTIFY.

A defendant in a criminal case has a Constitutional right to testify in how own defense under the Fifth, Sixth and Fourteenth Amendments. Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

As a fundamental Constitutional right, the right to testify is personal to the defendant and cannot be waived by counsel regardless of strategic or tactical considerations. Commonwealth v. Rawles, 501 Pa. 514, 523 N.3, 462 A.2d 619, 624 N.3 (1983); Commonwealth v. Wallace, 347 Pa. Super. 248, 254, 500 A.2d 816, 819

(1985); Commonwealth v. Mancini, 340 Pa. Super. 592, 607, 490 A.2d 1377, 1385 (1985); Commonwealth v. Bazabe, 590 A.2d 1298, 1301 (Pa. Super. 1991); United States v. Teague, 953 F.2d 1525, cert. Den. 113 S.Ct. 127, 121 L.Ed.2d 82 (1992); United States v. DiSalvo, 726 F. Supp. 596 (E.D. of Pa. 1989); DeLuca v. Lord, 858 F. Supp. 1330 (1994).

A defendant in a criminal case cannot effectively waive a fundamental Constitutional right unless there is an intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst; 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938); Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Therefore the defendant's waiver of his right to testify must be knowing and voluntary in order to be effective. Commonwealth v. Wallace, supra.

In order for a waiver to be knowing and voluntary it must be a decision made by the defendant after full consultation with counsel. Commonwealth V. Wallace, supra.; Commonwealth v. Fowler, supra.; and Commonwealth v. Bazabe, supra. The advice of counsel is crucial because there can be no effective waiver of a fundamental Constitutional right unless there is an "intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, supra.; United States v. Teague, supra. Defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide. United States v. Teague, supra., p.1533. While defense counsel serves as an advocate for his client, it is the client who is the master of his or her own defense. United States v. Teague, supra., p.1553;

Mulligan v. Kemp, 771 F.2d 1436, 1441 (1985).

This responsibility is consistent with the American Bar Association's Standards for Criminal Justice which provide:

> "(a) Certain decision relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:
> (i) what plea to enter;
> (ii) whether to waive jury trial; and
> (iii) whether to testify in his or her own behalf."
>
> Vol.1, Standards for Criminal Justice, Standard 4-5.2(a) 2ed. 1980).

Furthermore, the American Bar Association's Model Rules of Professional Conduct provide:

> "(a) A lawyer shall abide by a client's decision concerning the objectives of representation...and shall consult with the client as to the means by which they are to be pursued....In a criminal case, the lawyer shall abide by the client's decision, after consultation with the

> lawyer, as to a plea to be entered, whether to waive a jury trial and whether the client will testify."

Rule 1-2(a) ABA's Model Rules of Professional Conduct.

In this case the defendant wanted to testify, told his lawyer he wanted to testify, was prepared by counsel to testify and expected to testify until the end of the trial when his lawyer told him, "I'm not going to put you on the stand". (731., 74a., 75a., 76a., 88a., 96a., 97a., 98a., 101a.).

The defendant did not respond but instead acquiesced in counsel's decision not to put him on the stand because he trusted his lawyer, believed his lawyer had the authority to make that decision and didn't know he could overrule his lawyer. (75a., 76a., 88a., 101a., 102a.). Although the defendant had some prior experience in the criminal justice system he was never told by any lawyer, including Mr. Newman, that the decision whether or not he would testify was up to him. (75a., 76a., 79a., 80a.).

The defendant's testimony at the Evidentiary Hearing on January 30, 1997 was uncontradicted. The defendant's former lawyer, George Newman, Esquire, had no recollection of what he said to the defendant regarding his right to testify or the decision whether or not he would testify. (20a.). Although Newman had represented the defendant in several criminal cases before this case, he had no recollection of ever telling the defendant that the decision whether or not he would testify was up to him. (29a., 30a.). Furthermore Newman could not say what his general practice was in 1988. (36a., 43a.). Finally, Newman said he could not say whether the defendant acquiesced in counsel's decision not to put him on the stand, or whether the defendant made a personal decision not to testify. (40a., 38a., 45a.).

Under the circumstances, the P.C.R.A. Court's finding that counsel had informed the defendant of his right to make the ultimate decision whether or not he would testify is a presumption which is not supported by the record. In Johnson v. Zerbst, supra., 58 S.Ct. At 1023, the Supreme Court said that courts should not presume a waiver of a fundamental Constitutional right by acquiescence.

Furthermore, the P.C.R.A. Court's finding that the defendant was knowledgeable about the court procedure because of four previous criminal proceedings is irrelevant. A defendant's acquired practical knowledge of the criminal justice system cannot be a substitute for competent professional advice from counsel. United States v. DiSalvo, supra.; DeLuca v. Lord, supra.

Likewise, the fact that counsel told the jury in his opening statement that they may or may not hear from the defendant and told the jury in his closing argument that the defendant had the right not to testify, or that the trial Judge told the jury in his instructions that "it is entirely up to the defendant in each criminal trial whether or not to testify" is not a substitute for competent professional advice from counsel.

In addition, the P.C.R.A. Court's reliance on Commonwealth v. Bazabe, supra., is misplaced because the defendant in this case is not claiming that counsel was ineffective for failing to put him on the stand. Nor is this defendant claiming that counsel's advice that he not testify was unreasonable.

In this case the defendant contends he was deprived of a fundamental Constitutional right because counsel's waiver of that right was not an "intentional relinquishment or abandonment" of that right by the defendant. There cannot be an "intentional relinquishment or abandonment" of the right to testify unless the defendant understands that the ultimate decision whether or not he will testify must be made by him after full consultation with counsel.

The evidence introduced at the hearing on January 30, 1997, does not support a finding that the defendant intentionally relinquished or abandoned his right to testify. On the contrary, the evidence supports the conclusion that the defendant merely acquiesced in counsel's decision not to put him on the stand.

2. COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE THAT THE DEFENDANT'S WAIVER OF HIS CONSTITUTIONAL RIGHT TO TESTIFY WAS KNOWING AND VOLUNTARY.

When defense counsel fails to inform a defendant that the ultimate decision whether or not to testify belongs to the defendant he neglects a vital professional responsibility to ensure that the defendant's right to testify is protected and that any waiver of that right is knowing and voluntary. United States v. Teague, 953 F.2d 1525, 1534 (11th Cir. 1992); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In this case a fair reading of the P.C.R.A. record suggests that counsel probably did not inform the defendant that the ultimate decision whether or not to testify was to be made by the defendant. The defendant's testimony at the P.C.R.A. hearing was clear, consistent and uncontradicted; counsel never told him the decision whether or not to testify was for him to make. Furthermore, the defendant believed counsel had the authority to make the decision not to put him on the stand. Counsel's testimony that he had no recollection of what he told the defendant and could not recall what his general practice was in 1988 does not contradict the defendant's testimony.

Therefore counsel's performance was not within the range of competence required of attorneys in criminal cases and the defendant did not receive reasonably effective assistance of counsel. Strickland v. Washington, supra.; McMann v. Richardson, 397 U.S. 759, 770-71, 90 S.Ct. 1441, 1448-49, 25 L.Ed.2d 763 (1970).

3. THE WAIVER OF DEFENDANT'S RIGHT TO TESTIFY BY COUNSEL AND THE INEFFECTIVE ASSISTANCE OF COUNSEL IN THAT REGARD UNDERMINED THE TRUTH DETERMINING PROCESS AND PREJUDICED

THE DEFENDANT.

In order to establish actual prejudice a defendant must show that there is reasonable probability that but for the act or omission of counsel the outcome of the trial would have been different. Commonwealth v. Rainey, 540 Pa. 200, 656 A.2d 1326 (1995); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Commonwealth v. Ellis, 662 A.2d 1043 (Pa. 1995).

It is clear from the evidence introduced at the P.C.R.A. hearing on January 30, 1997 that the defendant would have testified at trial except for counsel's decision not to put the defendant on the stand.

There is also a reasonable probability that the outcome of the trial would have been different if the defendant had testified at trial.

The conclusion reached by the P.C.R.A. Court that the defendant's testimony at trial would not have changed the outcome is a presumption which is not supported by the record.

First, the P.C.R.A. Court refused to allow the defendant to testify about the events of November 14, 1986 during the P.C.R.A. hearing on January 30, 1997. Instead the P.C.R.A. Court confined the defendant to testimony directly related to the question whether or not the defendant was deprived of his right to testify. (69a., 70a.).

Second, the P.C.R.A. Court's conclusion that the defendant was not prejudiced because the defendant's testimony would have been inconsistent with Robert Barrett's testimony is not supported by the record and is based on an erroneous reading of Barrett's testimony at the defendant's trial.

The P.C.R.A. Court's opinion, page 9, states;

> "Most significantly, Barrett testified not only that Petitioner did not participate in the altercation, but that Petitioner was not even present on the street." Page 9 of the Opinion of the Court Below."

Unfortunately, the P.C.R.A. Court overlooked part of Barrett's testimony. Barrett testified that he heard the defendant's voice yelling, "Don't be crazy, Bob" while he was fighting with Baroweic. Barrett said he did not see the defendant because his attention was focused on the right with Baroweic (N.T., 12-7-88, pp. 423, 424, 426).

Therefore, contrary to the conclusion of the P.C.R.A. Court, the defendant's testimony would have been essentially consistent with Barrett's testimony.

More importantly, the defendant's testimony would have provided a detailed explanation of his actions after he left the apartment, especially his efforts to get

Barrett to stop fighting with Baroweic. (See 115a. To 131a. for the defendant's testimony at Barrett's Preliminary Hearing and 131a. to 179a. for the defendant's testimony at Barrett's trial).

At Barrett's trial in 1987 the defendant testified that after he and Barrett finished talking to Art Jones, he returned to the apartment and Barrett went to buy cigarettes. A short time later the defendant went outside again after he heard loud noises out in the street. (138a.). The defendant observed Barrett fighting with Baroweic. (139a.). The defendant saw the knife fall on the ground and he described their struggle to get control of the knife. (140a., 141a., 142a.). During this time the defendant remained in front of 4436 Griscom and repeatedly yelled to Barrett to get away from Baroweic. (141a., 142a.).

In addition, the defendant denied any plan to steal drugs from anyone (149a.).

The defendant's description of the fight between Barrett and Baroweic and the struggle over the knife was consistent and unwavering despite a vigorous cross examination by the prosecutor. (150a. To 178a.).

More importantly, the defendant's testimony was exculpatory and inconsistent with the prosecutor's theory that Barrett and the defendant planned to beat up Baroweic and rob him. In addition, the defendant's testimony contradicted the testimony of the Commonwealth's chief witness, Colleen DeMarco.

If the jury had heard the defendant's testimony and believed him their verdict would have been different.

CONCLUSION

Under the circumstances of this case the denial of post conviction relief should be reversed, the defendant's convictions should be reversed and this case should be remanded for a new trial.

Date: August 27, 1997

/s/ F. Kirk Adams, Esquire
F. KIRK ADAMS, ESQUIRE
Counsel for Appellant

CERTIFICATE OF SERVICE

F. Kirk Adams, Esquire, Counsel for petitioner hereby certifies that he served a copy of the within Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari on the attorney for the Commonwealth of Pennsylvania, Deputy District Attorney, Donna G. Zucker, Esquire, Chief of the Federal Litigation Department of the Philadelphia District Attorney's Office at 1421 Arch Street, Philadelphia, PA 19102 by U.S. Mail, postage prepaid, the date set forth below.

Date: 3-8-01

/s/ F. Kirk Adams, Esquire
F. Kirk Adams

IN THE COMMON PLEAS COURT OF
PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA.
CRIMINAL COURT DIVISION

COMMONWEALTH OF) AUGUST TERM 87
PENNSYLVANIA)
)
VS.)
)
GEORGE TRUDEL, JR.) NO. 2299
DEFENDANTS)

JANUARY 30, 1997
BEFORE: HONORABLE JOSEPH I. PAPALINI, J.
(PCRA HEARING0

APPEARANCES;
CAROL M. SWEENEY, DA
ASSISTANT DISTRICT ATTORNEY
FOR THE COMMONWEALTH

F. KIRK ADAMS, ESQS.
TWENTY ONE CHESTER PIKE
RIDLEY PARK, PENNSYLVANIA
FOR THE DEFENDANT.

REPORTED BY: BRENDA VARLACK, CSR, CM.
OFFICIAL COURT REPORTER

MS. SWEENEY: CAROL SWEENEY FOR THE COMMONWEALTH.

MR. ADAMS: KIRK ADAMS FOR THE DEFENDANT, YOUR HONOR.

(WHEREUPON THE DEFENDANT IS PRESENTED)

THE COURT: WOULD YOU GIVE ME A LITTLE SHORT SUMMARY AS TO WHAT TRANSPIRED AND WHAT WE WILL BE DOING HERE TODAY?

MS. SWEENEY: YOUR HONOR, WE ACTUALLY, I THINK, CAN AGREE ON THIS SHORT SUMMARY.

THE COURT: OKAY. GOOD

MS. SWEENEY: WHICH IS THE SUPERIOR COURT HAS REMANDED FOR

A HEARING IN FRONT OF YOU. THE QUESTIONS WHETHER THE DEFENDANT CAN SATISFY HIS BURDEN OF PROOF THAT HE WAS IMPEDED FROM TESTIFYING AS A WITNESS AT HIS WHOLE TRIAL AND DID NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVE HIS RIGHT TO TESTIFY.

THE COURT: BY WHOM?

MS. SWEENEY: BY DEFENSE, ACCORDING TO GEORGE NEWMAN, WHO WILL BE A WITNESS HERE THIS AFTERNOON.

MR. ADAMS: ESSENTIALLY, I AGREE.

THE COURT: IS THAT HIM COMING IN?

MS. SWEENEY: YES.

MR. ADAMS: IF HE'S HERE, WE WOULD CALL HIM AS OUR FIRST WITNESS.

THE COURT: EXCELLENT TIMING. WHO ELSE DO YOU HAVE BESIDES MR. NEWMAN?

MR. ADAMS: MR. TRUDEL. THAT'S IT.

THE COURT: ALL RIGHT. YOU'RE GOING TO CALL MR. NEWMAN FIRST?

MR. ADAMS: SINCE HE'S HERE, WE WILL DO THAT, AND I WILL AGREE WITH ESSENTIALLY WHAT CAROL SWEENEY HAS

TOLD YOU. WE MAY NOT USE THAT EXACT, THAT SAME LANGUAGE, BUT SHE WAS CORRECT THAT IS REALLY THE ONLY AREA FOR INQUIRY FOR THE COURT.

MS. SWEENEY: YOUR HONOR, I WOULD MOVE TO SEQUESTER ANY WITNESSES BECAUSE COUNSEL HAS ASSURED ME THAT THE ONLY TWO WITNESSES THAT HE ANTICIPATES CALLING ARE THE DEFENDANT AND MR. NEWMAN.

THE COURT: IS THAT CORRECT?

MR. ADAMS: THAT IS CORRECT.

THE COURT: SO, THERE ARE NO OTHER WITNESSES? ALL RIGHT. FINE. GO AHEAD, SIR.

GEORGE NEWMAN:

The witness is hereby sworn and testifies under oath as follows:

DIRECT EXAMINATION BY MR. ADAMS:

Q Are you a member of the Bar?

A I am.

Q And when were you admitted to the Bar?

A 1975

Q And what areas of practice did you become involved in?

A Criminal. Criminal Defense

Q In 1988 or 1987, did you come in contact, have professional contact with George Trudel, the man sitting to my right?

A Yes

Q and, in fact, were you appointed to represent Mr. Trudel?

A I was.

Q Now, did you represent him a jury trial which took place in December of 1988?

A Yes. I mean, I don't have a direct memory of exactly when it was, but I know from looking at my file it was in '88.

Q Okay, but I suggest to you it was in December of 1988.

A I have no cause to disagree with you.

Q Do you have sufficient recollection of the case to testify as to whether or not Mr. Trudel testified during his trial?

A It's my recollection he did not.

Q did you speak with hi8m about the subject of whether or not he would testify either before or during the trial?

A I am sure that during the trial we had discussions.

Q Were you aware that he had testified about this case in the trial of another defendant, a man named Robert Barret?

A Yes

Q And had you obtained the transcript of the notes of testimony from Mr. Barret's trial to know what Mr. Trudel had said during that trial?

A Yes

Q Do you remember that Mr. Trudel had also testified at the preliminary hearing for Mr. Barret?

A Upon looking through the materials, some of which I had, some of which were sent to me by the District Attorney, I was reminded of that.

Q Do you recall now, and can you testify today as to what you may have said to Mr. Trudel and what he may have responded to you when you were discussing the subject of his testifying at his jury trial?

A I have no memory of the specific conversations regarding his testimony, I can say that it was to my recollection that I felt it would be a bad idea for him to testify. That was my belief.

Q At some point, either before or during the trial itself, the jury trial, did you actually make a decision, that you can recall now, that you were not going to put the defendant on the witness stand or not have him testify?

MS. SWEENEY: I OBJECT TO THE FORM OF THAT QUESTION, YOUR HONOR.

THE COURT: WHY DON'T YOU REPHRASE IT.

Q Did you make a decision that you can recall now regarding that subject?

A I made a decision about what I believe would be the advisability of him taking the witness stand; that's correct.

Q And what was that decision?

A I decided that, at least from my perspective, it would be a bad idea for him to testify.

Q And did you – do you recall now explaining that to Mr. Trudel at any time?

A I don't recall the discussion

Q Do you recall saying to him, "I'm not going to put you on the witness stand"?

A I don't remember the words I used.

Q Do you recall anything that he may have said to you about that subject, his testifying?

A I don't recall the discussions at all, either, what I said to him or what he said to me. I'm certain there were discussions, but the substance of them, how they went down, I couldn't tell you at this point in time.

MR. ADAMS: NO FURTHER QUESTIONS, YOUR HONOR.

CROSS EXAMINATION BY MS. SWEENEY

Q Would you give us a little more information about your background; when you came out of law school and were licensed to practice in Pennsylvania, for whom you worked, for how long, and how you developed a private practice as a lawyer specializing in criminal defense work?

A Sure. I interned for the public defenders for two years prior to graduation. I worked for the public defenders, which is purely a criminal defense organization here in Philadelphia, for four years. From the summer of 1975, I became a member of the Bar on October 3rd of 1975. I resigned from the Defenders on October 15th of 1979. Um, I kept the various pieces of paperwork. I can recall exactly when those things occurred. I left the Defenders and went into a private practice. It was an association, although not a partnership, with a couple of other lawyers.

I clerked for the Honorable Richard B. Klein for three years, and also had a practice on the side, um, which I believe did not interfere with my clerking duties which were largely to do research on opinions, um, and also to work on, um, occasional civil motions.

At that point in time, there were very few civil motions that were assigned to the Judge, though they were assigned to the Criminal Program.

Um, I resigned my position with Judge Klein in, I believe, the beginning of 1983.

By that time, I had formed a partnership with two other criminal defense lawyers, and I was in partnership until 1986, when I formed the partnership with my present partner, David McLaughlin, and I've been partners with Dave since 1986.

And I have, except for a very brief dabbling in civil work during that very initial period prior to forming the partnership, the first real partnership I had I did a tiny bit of civil work, but I did not like it, and since the early '80s, I've practice exclusively criminal law.

Q Can you estimate, although it's a very tough question to answer, the number of jury trials that you have tried; say, for instance, in the period after leaving the Public Defenders's Office and while in Private Practice until you tried this case in December of 1988?

A Scores of jury trials. I couldn't tell you how many exactly. As you well know, a lot of trials in Philadelphia are nonjury, but I did scores of trials. I had done – I couldn't estimate how many homicide trials I had done.

Q That was going to be my next question.

A Well, anticipating that, I had probably done 20, 30 homicide trials, and what percentage of those were juries, I couldn't say. Some were nonjuries.

Q That's all prior to the time that you began the trial of this case with Mr. Trudel?

A That's correct. To date, I've handled well over a hundred homicide cases. How many, I couldn't tell you.

Q When you were appointed to represent Mr. Trudel in 1987, was that you first contact with him or had you represented him in other matters, as well?

A That was my first contact with him, as well.

Q Isn't it true that you remained his attorney through not only the trial and conviction in this case, but through the direct appeal of the case to the Superior Court and through the petition for Allocatur to the Pennsylvania Supreme Court as well?

A That's correct.

Q As a result of your being court-appointed in that matter, did you prepare a fee petition to document the work for which you believed you were entitled to compensation.

A Yes.

MS. SWEENEY: YOUR HONOR, I HAVE COPIES OF THAT. PLEASE, IF WE MAY MARK THAT AS COMMONWEALTH'S EXHIBIT C-1 AND SHOW IT TO THE WITNESS FOR IDENTIFICATION.

THE COURT: OKAY.

THE TIPSTAFF: C-1 SO MARKED.

Q Counsel, is that a xeroxed copy of the fee petition you submitted following completion of your work for this defendant?

A If you'll indulge me a moment.

(WHEREUPON THE WITNESS REVIEWS THE DOCUMENT.)

Yes, that would be the first fee petition. There were probably subsequent fee petitions for the appellate work. I don't know if this – I think this fee petition takes you through the filing of the first notice of appeal.

Q In April of 1989?

A Correct. There would have been subsequent work for which I would have billed and submitted fee, subsequent fee petitions, which are probably contained within the fee section of the file.

Q Is the information that's on here an accurate reflection of the work that you performed?

A It should be. I keep time sheets which are pretty meticulous, and I basically have my secretary transcribe them into legible English. In other words, she types them because my handwriting is close to indecipherable, as you've discovered.

Then, I review it, and I make sure that it appears to be accurate, as accurate as it can be after reviewing, after the events have transpired, but I have no reason to believe that there's anything that's inaccurate in here.

Q If I represent to you that that shows that you billed for seven conferences with the Defendant and two telephone calls, would that comport with your recollection of meeting the defendant on numerous occasions to discuss his case?

A I have no reason to believe that that's not accurate.

Q This defendant, in fact, was on bail at the time leading up to his conviction. Isn't that true?

A That is true.

Q In fact, he was on bail due to a large part of the work that you succeeded in accomplishing in not only getting him out on bail, but then litigating in Superior Court, the Commonwealth's Petition to Revoke his bail. Isn't that correct?

A Yes.

Q Which, isn't it fair to say, would make it a fairly unusual court-appointed homicide case, that you had a defendant out on bail to come out and meet with you.

A It was complex. There is no question about that. There were some things I did that I had done for the first time.

Q Isn't it also fair to say that this was an unusual case to you to the extent that, in fact, in this situation you had a defendant who already had testified twice under oath in the trial of his co-defendant, Robert Barret, and already had given two signed statements to homicide detectives, all concerning the issues in this case? Isn't that true?

A Yes. Yes.

Q And isn't it also true that as a result of that unusual posture, you didn't even take any interview notes when you met with the defendant for the first time about the case?

A From looking through the File, I have no independent recollection, but from looking through the file, that seems to be accurate. There may be some scratch notes in the file, um, but no lengthy interview.

Q Finally, Mr. Newman, isn't it fair to say that this was an unusual case at the time that you were trying it, because the posture of this case was that you had a codefendant, Robert Barret, who had been previously tried, who was willing to come into Court and testify that he was the person who stabbed the victim in this case, and that your client was not involved. Isn't that true.

A That's true.

Q So, isn't that unusual for you to do, at least as of 1988?

A It's not real common. That's correct.

Q You represented the defendant in at least two other matters; two that were criminal trials here in Philadelphia or criminal proceedings here in Philadelphia, in addition to this homicide case. Isn't that true?

A Yes

Q And isn't it also true that one of those two matters was a burglary charge for which the defendant went to trial as a nonjury trial, and you represented him, and he was found not guilty? Is that true?

A Yes

Q And it's also true, is it not, that the second matter was a case for which the lead charge was aggravated assault, and that at some point after the defendant's conviction in this case, you represented him, and it resulted in a guilty plea to disorderly conduct? Does that comport with your recollection?

A I discussed this matter with you, and I had no independent recollection of the resolution. I did recall the specific resolution. I did recall that after Mr. Trudel's conviction of second degree murder, we wanted to resolve the aggravated assault case, and I recall, it was my recollection that we resolved it in some pretty satisfactory manner. If it was pled as a disorderly conduct, that was certainly what I regarded as a satisfactory resolution.

Q I'd like you to focus your attention first upon the burglary case for which you represented the defendant. In that matter you were retained by the defendant or his family. Isn't that true?

A Yes

Q And that trial went to trial before the second degree murder case. Isn't that true?

A yes, it did.

Q Can you recall discussing with the defendant, in order to prepare for that trial, his right to testify as a defendant in the criminal case?

A Again, I don't have a specific recollection of what I said to him regarding that case, and I don't remember very much of the details. I mean, I'm more likely to remember facts of a case, and I remember something about him being in a car, maybe asleep in a car, and that's all I remember of that case. But the fact patterns are what usually stick out in my mind.

Q Well, in terms of that fact pattern, did you have a discussion with the defendant in that case to prepare him to testify for the trial in the burglary case?

A I probably did, but there is no way I could recall that. I mean, I represent hundreds of people every year, and to remember the specific conversation I've had with each defendant – I mean, over my career I've represented thousands of people, and I was a public defender. It went – probably went into the tens of thousands, at least in terms of people who I would interview or talk to.

So, the specifics, of course, unless there's something startling about the particular conversation, I'm not going to have a specific recollection. I can only speculate as to what I might have said to him in the burglary case. I don't recall if he testified or not. So my guess, and it's only a guess, is that he didn't – that the case was simply not made out by the Commonwealth. That's my vague recollection. It may have even been a Demurrer sustained.

Q Do you remember specifically, that you specifically told the Defendant in either of the other matters that you represented the defendant, that he had the right to testify if he wanted to?

A I don't recall that. That I can't tell you.

Q As you prepared for trial, is it fair to say that your theory of Defense, multifaceted as it might have been, included the testimony of a co-defendant that your defendant didn't even do it, corroborated by other witnesses whom you brought to Court to testify, and included a vigorous attack upon the testimony of the Commonwealth's witness, Colleen DeMarco?

A Let me agree with part of what you said. Um, I had Mr. Barret, who I though was a pretty good defense, and I think the rest of the witnesses were in some way presented to impeach the testimony of colleen DeMarco.

I recall, from having looked through my file, what I recall is Mr. Barret was the only offensive part of my defense, and the witnesses were used to attack Colleen DeMarco's credibility. That's my recollection at this point in time.

Q Do you recall calling Mr. Barret's brother, Kenneth Barret, to testify that Mr. Barret, the

Co-defendant, Robert Barret, had admitted to him being the stabber in the case?

A I don't recall that part. I don't disagree with you that that occurred. I just don't recall the brother's testimony at all without reading it. If I read it, I'm sure it would come back to me.

Q As an experienced defense attorney of some 13 years experience, when you were getting ready for try this homicide case, did you prepare the defendant, prep him, in the colloquial terms we use, for the inevitability of him testifying, should he choose to do so?

A I'm sure I did. I'm sure I prepped him, but what I – but remembering preparing him or what I told him, I can't remember. Even if I'm pretty well convinced I won't call someone, particularly a defendant, I'm going to prep them, at least minimally; so, that if push comes to shove, I can shift gears and try and get it right. In a murder case, I expect I would prep someone to testify.

Q Wouldn't it be your standard practice as a defense attorney to prep someone to testify?

A Yes

Q And wouldn't it be your practice of someone in a murder case to evaluate with the defendant the strategy, advantages, and disadvantages of the defendant taking the stand to testify?

A I would evaluate it. How much I would share with the client is a fluctuating thing. I mean, it really depends on the client. It really depends on a lot of factors. It depends sometimes on the relationship of the lawyer and the client. It depends on whether or not you've been retained or not, or whether you've been court appointed.

Um, I think that sometimes there's actually more candor toward a client when you've been appointed, because it's not an issue for the client to, frankly, to put it bluntly and crudely – they don't have a great deal of other, of other options. I think when you're retained, there's this unfortunate restraint on counsel because clients, um, certainly, to my experience nowadays, are mercurial in terms of counsel.

I have guys coming over to me from other lawyers constantly and vice versa, there's a real concern about just what you say. You have to pick and choose your words very carefully.

Q Mr. Newman, as you sit here today, is there any discussion at all you can remember with this defendant about his right to testify?

A Not about the right to testify. About the testimony itself, again, I have no specific recollection, but I would – there is no what that I didn't talk about what he would testify to or ask him what he would talk about.

I would, I'm sure I went over what I thought were the weak points or the strong points of the testimony. I'm sure I went over the testimony entirely.

Q Isn't it fair to say you did this many times, both before the trial and during the trial?

A How many times I went over it with him, I couldn't say. I could only guess it was more than once, but I couldn't say definitively. I would presume it would have been more than once. I would presume that we would have gone over it.

Some of the meetings that we had – you point out there were a number of meetings with regard to not only his own testimony, but other witnesses; Barret, Colleen DeMarco, who knows who. I went up and spoke with Colleen DeMarco.

Q Sir, I would ask to confine yourself to the question that I asked which is: Do you know how many times you spoke to the man about testifying?

A I couldn't – I couldn't answer that . No.

Q Is it fair to say that you did speak to the man about testifying before the trial even began?

A I'm certain I did.

Q And would that comport if I asked you to recall your opening statements, page 31 of December 6th of 1988, with your explanation to the jury that:

> "You may hear from the defendant, who

has no obligation to testify. You may hear from him; you may not. I'll speak more on that later, but the bottom line is the Commonwealth has the burden to present that kind of evidence; the quality of evidence that convinces you beyond a reasonable doubt."

Do you remember telling the jury that?

A I don't specifically remember it, but that's certainly the kind of statements I would have made to a jury.

Q Do you remember telling the jury, "You may or may not hear from George. We haven't decided that yet"? Do you remember that?

A I don't recall. I don't remember that, but you've indicated that, and I have no doubt that's what I said.

Q Having heard or being refreshed that that's what you said, does it help you remember any discussions you had with this man in a murder case about his right to testify?

A Again, I don't recall specifically what we talked about in terms of his rights, what I explained to him in terms of what exactly were his rights; and I can clarify that if you'd like me to.

Q To the extent that it's relative to the question, what, if anything, do you remember about the discussions? Specifically, I would like you to respond. If it's something beyond that, then the question hasn't focused on that.

A I'll give my answer. Perhaps if it's not appropriate, you know, you're a good lawyer. You'll know how to cope with my answer. I know I currently tell people – it's what I almost call the "Holy Trilogy". There are three decisions which are those for a defendant to make and the defendant's alone, and those decisions are whether or not to plead guilty, whether or not to waive a jury or not, and whether or not to testify.

I currently tell people that. What I told him back 1988, I can't tell you, and I can't give you any assurance that that's what I told people back then. My ability to represent people, what I tell them, how I deal with them; my client relations have all evolved over the years; and in a way, saying what I say now kind of clouds my abilities to go back and say what I specifically told people back then.

I just don't have a recollection. It may sound stupid from your mind. I'm not able to do that, but I can't specifically recall what I said to people in terms of preparing them, in terms of telling them exactly what their rights are.

Q Well, with respect to this case, if I ask you to focus upon the closing statements that you gave to the jury in this exact same case, starting at page 458 of December 8th of 1988, speaking of George Trudell:

"He did not take the witness stand. He does not have to. You all know that. You heard it when you were sitting out there. You heard it again from his Honor when he first instructed you. You heard it from me when I first addressed you at the beginning of the trial. He does not have to take the witness stand.

Why? Because again, it would be crazy if we said a person doesn't have to prove himself innocent; then, we say they have to take the witness stand explain themselves".

Do you remember that focus of your closing argument to the members of the jury?

A Again, I hear you reading it, and I'm sure that's what I said.

Q Do you remember telling the members of the jury:

"People don't take the witness stand for many reasons. You haven't heard from George. So, I mean, you never heard statements attributed to him. You have heard about some of his actions or nonactions, but you must understand, you swore under oath that you would not hold it against him if he elected not to take the witness stand."

Do you remember using those words when addressing the members of the jury in your closing arguments?

A I'm sure that's what I said, having heard it.

Q Does that, having heard it, refresh your recollection, of your decision that the defendant made not to take the stand in this case.

A It doesn't. You've kind of shifted the question; did he, did I. I mean, it doesn't refresh my recollection about the specific conversations did he decide not to take the stand. Did we have a discussion about that? I can't answer that. Again, I mean, I'm still going back to the same thing; what I say in an opening or a closing is for the jury's benefit.

Q Well, you wouldn't misstate something, would you, Counsel?

A I'm not going to tell them what the discussions were between my client and myself. That's attorney-client privilege. At that point in time, I'm not going to share that with them. I've had district attorneys object to language very close to that.

Q But no one objected here.

A Well, I know they didn't there, but what my concern is that I say something that's not going to be objected to, that's not going to be construed against my client.

Q So if you represent to the members of the jury, he decided not – he elected not to take the witness stand, it's your testimony now that that may not reflect reality?

A Well, he certainly acquiesced or agreed or disagreed or whatever he did, but he did not take the witness stand, and I've got to present that in the light that I think will reflect the best upon him for the jury. That's my concern in closing.

Q And you continued to address that to the members of the jury by saying, bottom of page 459:

"Some people are incredibly nervous on the witness stand. If you're on trial for murder, you can imagine how nervous you would be. Some people are articulate, and some people are not.

Witnesses, other than the person who is accused, have to appear in court. If they're subpoenaed, they take the witness stand. George Trudel had a right to decide that he was going to say, "I'm not going to take the witness stand; I don't believe you proved this case against me; You have not –'" and at that, Mr. Carpenter, the DA, objected.

Do you remember using that language, again, telling the members of the jury that the defendant decided not to take the witness stand? Do you remember saying that to them?

A I don't specifically remember, but I'm sure I said that to them.

Q Wasn't it correct –

A I can't tell you exactly what the conversations were between Mr. Trudel and myself. I can't tell you whether or not his not taking the stand was acquiescence, whether it was an affirmative decision or what. I think that the statement I made was an accurate statement for purposes of jury argument

Q Counsel, haven't you on many occasions stood up and tried to explain away the defendant's election not to testify by saying to the members of the jury, "My client has relied upon me to recommend that he not testify"? Haven't you both used that argument and heard other people use that argument?

A I've used a whole variety of different arguments, some of them that have been objections like Mr. Carpenter objected to here. Sometimes I've used arguments that – where the objections were sustained.

Q My question – that's not my question. I'd like you to try and answer the question. My question is, haven't you personally and haven't your heard other people tell members of the jury that it's the lawyer's decision that a defendant decided not to testify, to try and take the weight on your shoulders or off the shoulders of the defendant?\

A I don't know that I heard, that I heard people say that.

Q Haven't you?

A I don't think I have. I don't think I'd say it's my decision. I don't think I would say that.

Q As a way to explain to the members of the jury that it's not the defendant who's up there, it's him following my advice; that that's why he's not up there?

A Well, I've always been aware that it's not my decision ultimately. So, I don't think I would have said that to the jury, because I think that would be actively misrepresenting to the jury.

Q Well, were you aware as far back as 1988, with 13 years' criminal law experience, that it was not your decision, ultimately, whether the defendant took the witness stand?

A Yes

Q and didn't you convey that to them?

A You've asked me the same question about four times. I can't say specifically that I said that to him. I know it's my practice to do it now. I know that even in 1988 most judges colloquied defendants; I know even earlier than 1988. I was surprised when you informed me there was no such colloquy in this case, but as to whether or not I specifically had that decision, listen, it's your call about whether you testify, not my call. I can't tell you that I related that to him.

Q Wasn't it your practice back then to make sure that every murder defendant on trial with the potential of life imprisonment on the line knew the full extent of what his rights were?

A I can't say specifically what I told him. No.

Q With 13 years' experience under your belt at the time of this trial, can you remember any murder trial in the 20 or 30 that you did before this, where you had a specific discussion with the defendant about testifying or not?

A No.

Q Not one?

A No, I don't remember the specific conversations I would have had with various clients.

Q Can't you remember what your practice was with 13 years and 20 to 30 murder tails under your belt in terms of making sure a defendant knew that it was hi right to testify, if he chose to do so?

A I can't specifically tell you what I would have done in each case, and I wasn't just trying murder cases. I was trying a whole slew of cases, and in many of those cases, the real discussion, if any, and I emphasize "IF ANY" is during the trial when you turn to the guy and say, "I don't think it's a good choice for you to testify." And the guys says, "Okay". You may find that hard to believe, but often, that's the way it really occurs.

Q In murder trials, sir, when a defendant gives you an explanation of whatever it was he might want to know, when you prep him –

A Uh-huh.

Q – do you know, don't you explain to him that it's his right to testify and tell the jury, whether you agree it's smart or not, that it's his right to testify?

A I currently do, but I can't tell you what I did back in the '80's.

Q Was there ever a time when you didn't, in 13 years' trial experience, 1988, when you weren't telling people that it's their right to decide whether to testify?

A I can't tell you what I did back then.

Q Isn't it fair to say, Mr. Newman, that you were personally, not just professionally, but personally devastated by the verdict that sent this man to jail for the rest of his life?

A I took the loss pretty hard. I took the loss pretty hard. It was A –

Q That's a "Yes," isn't it?

A It is. Yeah. I don't know. I mean I've reviewed the letter that I wrote to him after this, and, um, I took it pretty hard. Um, I also wanted to convey to George in a very clear way that I took it very hard. I didn't take it lightly.

Um, I mean, I think that's an accurate statement. I, you know, I don't regard him as a friend or a close associate or anything of that nature, but I get pretty invested in my trials, and I took this pretty hard.

Q You may get invested in trial, but in this case where this man was sent to jail for the rest of his life, isn't it fair to say that you carried the burden of that with you for a very long time?

A Yes.

Q Isn't it also fair to say that as you represented the defendant through the Superior Court Direct Appeal and through the Petition for Allocatur, you looked for any possible issue that you could raise to try and rectify what you thought was the injustice of this case?

A Yes.

Q In any of the work that you did, did you ever raise the question that the defendant did not testify, and the decision to do so was not knowingly, and intelligently made?

A No.

Q Not once?

A No.

Q Did the defendant at the trial ever say to you "I want to testify"?

A I don't recall him ever saying that to me.

Q If the defendant had said to you, "I want to testify," would you every have prevented him from testifying?

A That I would not have done. Again, I've always been aware that it's his right to testify. I may not have earlier in my practice been as assiduous as I should have been in advising clients of that. It is their right, not mine. Again, I just can't answer that. I can't give you a "Yes" or "No".

Q When you say "earlier in your practice," you mean the 13 years that you had been practicing exclusively criminal law?

A Yes.

Q You're referring back that far?

A You know, it's funny, Miss Sweeney, but I'd like to think I'm a much better lawyer than I was two years ago, and it may sound ludicrous to you, but I like to think that I continue to learn and continue to learn how to deal with my clients and how to deal with my cases and how to deal, you know, with the whole system, and I know that involves that I change in terms of what I do, and hopefully, I improve.

Q Have you ever prevented a Defendant who wished to testify from testifying?

A That I've never done.

Q Have you ever told the defendant you're just not going to call them, or in any way impeded him if he wanted to testify?

A If he articulated to me, if he said, “I want to testify,” I’d say – I might have said to him, if he had said that – again, speculating because I don’t recall what he said to me, but if he had said, “I want to testify,” I would have said to him, “It’s a bad idea, but if you insist, go ahead.”

Q That would have been your practice?

A Yes

Q Is that correct?

A With regard – again, I can’t tell you what I informed him, but if he insisted on testifying, I would not have prevented him.

Q Isn’t it true, as you sit here today, you have no recollection that he told you he wanted to testify?

A That’s correct.

Q Isn’t it also true that after correspondence back and forth for years while you continued to represent him, not once did this defendant complain to you that he had wanted to testify at his trial, and you denied him the opportunity to do that?

A I recall no complaints.

Q Well, did you have a chance to look through your file?

A I not only call no complaints, but saw nothing in my file that would in any way refresh my recollection as to any complaints.

Q So, as far as you know, the answer is he never complained to me verbally or through a correspondence, and no one on his behalf complained that he was denied his right to testify until this PCRA was filed here in 1992? Is that right?

A To my knowledge, that's correct.

Q You engaged in a series of communications with the defendant over the years as he was working and you were working on the appellate phase of the case. Is that correct?

A Yes.

Q Do you remember receiving from the Defendant a note early on after the verdict where the defendant wrote to you and asked you various questions about commutation or how long he would have to serve his sentence?

A I don't specifically remember, but if you show it to me, I'm sure it will refresh my recollection.

THE TIPSTAFF: 2-C MARKED.

MS SWEENEY: DEFENSE COUNSEL HAS A COPY AND THERE'S A COPY FOR THE COURT.

(WHEREUPON, A COPY IS GIVEN TO THE WITNESS.)

A I don't recall this letter, but . . .

Q You don't recall whether you received it or not?

A If it's in my file, if it's a xerox of something that was in my file, I certainly received it. I just don't recall it.

Q Can we agree that it's in there, that that's a copy of a document that's in there?

A I'm sure if you represent that this is something you xeroxed from my file, I'll agree with you.

Q Do you remember writing back to the defendant on February 8th of 1989 attempting to answer the questions he raised and describing your personal reaction to his verdict as being "still devastated by the verdict that we had in your case"?

A I remember seeing a letter in which I indicated that. Um, I'm sure I wrote back to him.

MS. SWEENEY: YOUR HONOR, COULD WE MARK THAT AS COMMONWEALTH EXHIBIT 3?

THE TIPSTAFF: C-3 SO MARKED.

Q I have a copy.

A As I do with all my clients.

(The Exhibit is given to the witness.)

Q Isn't it true you describe yourself there as "still devastated" and conclude with "deep regrets and best regards"?

A Yes

Q Isn't it next true that the defendant sent you, for your review, pleadings that he had prepared of such issues to be complained of on appeal; two sets of documents?

A He may have.

MS. SWEENEY: MAY WE MARK IT COLLECTIVELY AS COMMONWEALTH EXHIBIT C-4?

THE TIPSTAFF; C-4 SO MARKED.

MS. SWEENEY: May I mark it A and B?

THE TIPSTAFF: C-4A and B.

MS. SWEENEY: THEY ARE A SET CALLED "ADDITIONAL MATTERS TO BE COMPLAINED OR ON APPEAL." AND THEN THE PAGE THAT BEGINS "IN THE CASE OF COMMONWEALTH VS. TRUDEL–"

THE WITNESS: THAT'S WHAT?

(Whereupon, the document is given to the witness.

Q Mr. Newman, isn't it true that in all those pages of material that were just marked collectively C-

4A, not once does the defendant complain that you had ever prevented him of his right to testify or state anywhere that he had wished to testify at his trial?

A I can't answer that without reading everything in here, but if you represent that as correct, I'll accept that.

Q In response to those pleadings, do you remember writing to the defendant on August 8th of 1989?

A Again, you need to refresh my recollection.

MS SWEENEY: YOUR HONOR, MAY WE MARK AS C-5, PLEASE, A LETTER ON NEWMAN AND MCLAUGHLIN LETTERHEAD.

THE TIPSTAFF: C-5 SO MARKED.

(Whereupon the Exhibit is given to the Witness.)

Q Counsel, isn't it true that when you wrote to the defendant on August 8th, you told him:

> "If you believe I'm wrong in terms of how you analyze the appeal issues, you certainly may petition the Court for an Appointment of new counsel and request permission for your appeal to be delayed so that new counsel may prepare an alternative brief. I don't know whether the Court will permit you to do that, but you can certainly try".
>
> "You should make whatever efforts you can to secure your freedom,".

Isn't that what you told the defendant?

A In part.

Q Did he ever, to your knowledge, attempt to obtain another counsel to represent him for the

Appellate stage of his case?

A I have no knowledge of him having done that.

Q As far as you were concerned, he continued to be satisfied with your representation. Is that correct?

To my knowledge, he was.

Q And even after you said, “Do anything you can to try and get your freedom,” the defendant never complained that he wanted to testify at his trial, and you didn’t let him, did you?

A I’m sorry. Can you repeat that?

Q Even after you told the defendant, “You may be able to get a new lawyer if you ask; you should do whatever you can do to secure your freedom,” he still didn’t say, I wanted to testify at my trial, and you didn’t let me, did he?

A He did not offer that to me.

Q You then communicated with the defendant in April of 1990, when you sent the defendant a copy of the brief that you were filing for the Petition for Allocatur. Do you remember that?

A Again, if you show it to me, I'll be happy to look at it.

MS. SWEENEY: MAY I HAVE MARKED THIS MARKED AS C-6? DATE APRIL 5TH, 1990, A COPY OF A LETTER.

THE TIPSTAFF: C-6 SO MARKED.

(WHEREUPON, C-6 IS GIVEN TO THE WITNESS.)

Q And, Mr. Newman, isn't it true you told the defendant, "I must tell you it is rare that the Pennsylvania Supreme Court grants allowance of appeal, but I am ever hopeful that this Court will grant you the justice you deserve"?

A Yes.

Q Now, as these years are going by from the time of the trial, and your common practice of discussing with the defendant his right to testify was evolving, did you ever say to yourself, "Gee, I dropped the ball with George Trudel. I never told him he had the right to testify"?

A By 1990, I would have had no recollection of what those conversations were, and I certainly never told him that.

Q Sir, you had a good recollection of this case as of the denial of the Allocatur Petition and the Defendant's attempt to secure help through yet another counsel. Isn't that true?

A I had a good idea of what the legal issues were that I wanted to raise. I had received a pretty extensive – you just showed me a pretty extensive "additional matters to be complained of on appeal," and what I was essentially doing in the letter in response to that was saying, I'm not going to include any of these issues. Indeed, it's too late.

And, furthermore, I wouldn't include them, and if you don't like it, you can get another lawyer. That's essentially what that letter was really saying. It was saying in a very polite form, but that's what it was saying.

Q As you moved on in your career and dealt with the devastation of this case. Did it ever occur to you that you had been less than competent in discussing with the defendant his right to testify?

A No.

Q You then heard, after the Supreme Court in this

State declined your Petition for Allowance of Appeal, that the defendant had approached another attorney by the name of - -

A John Scott.

Q John Scott, with the intent, apparently, of proceeding with a PCRA Petition. Isn't that right?

A I remember John Scott contacted me. I believe I sent him the transcripts, I think, and perhaps other materials. I don't recall what he requested. There may be a cover letter in the file indicating what I sent him.

Q Well, first, you wrote to George Trudel on November 6th of 1990 and informed him that the result that you had anticipated, based on common practice, was in fact the result in the case: The Pennsylvania Supreme Court denied Allocatur.

MS. SWEENEY: MAY WE MARK AS COMMONWEALTH EXHIBIT C-7 A COPY OF A LETTER DATED NOVEMBER 6TH OF 1990?

THE TIPSTAFF: C-7 SO MARKED.

(WHEREUPON C-7 IS GIVEN TO THE WITNESS AND THE COURT.)

Q Isn't it true that what you suggested to the Defendant was since you had been told John Scott, criminal defense lawyer, had been approached regarding filing a possible post-conviction hearing and petition, this case was ripe to do, that he should get in touch with John Scott as soon as possible, so that he may initiate initial proceedings on the defendant's behalf?

And isn't is true you then noted, "I am truly sorry we didn't do better in this case. I did fight hard for you, but sometimes all the effort comes to nothing. You didn't deserve to be given so much time. I do hope –"

A I did write that.

Q And you concluded:

"I do hope Mr. Scott can find something to help you with. You know I will do anything I can to help you within the bounds of ethics and the law. If you have any questions, please do not hesitate to call me".

For all intents and purposes, Sir, didn't you throw your door open and say, I will help anybody that's trying to get George Trudel either a new trial or the charges thrown out?

A Within the bounds of ethics and the law, and I wrote that in my letter.

Q At that point, two years after the trial, it still did not occur to you that there was something amiss in the defendant's decision not to testify, did it?

A No.

Q And then?

MR. ADAMS: WELL, I OBJECT TO THE FORM OF THE QUESTION. IT ASSUMES THAT THE DEFENDANT MADE A DECISION. I DON'T THINK THAT MR. NEWMAN HAS STATED THAT IN ANY WAY.

THE COURT: WHY DON'T YOU REPHRASE THE QUESTION.

A It still, as you were looking for a way to help the Defendant, did not occur to you that the decision not to testify, have the Defendant not to testify, was in any way an infringement upon his right, did it, Mr. Newman?

A It never occurred to me that that was an issue.

Q And you then did send a substantial amount of your file to John Scott, and to the extent that it would be possible, volunteer your services to help him. Isn't that true?

A Well, again, I'm indicating that I'm going to be cooperative with counsel, not obstructive.

MS. SWEENEY: YOUR HONOR, MAY WE MARK AS COMMONWEALTH EXHIBIT C-8, A LETTER FROM MR. NEWMAN TO JOHN SCOTT, DATED DECEMBER 5TH OF 1990?

THE TIPSTAFF: C-8 SO MARKED.

Q Even after sending all of these materials to Mr. Scott, you did not hear anything about a Complaint that the Defendant wished to testify at his trial, but had been prevented from doing so, did you?

A I don't think I heard anything from John Scott about anything, quite frankly.

Q And is it fair to say that the first time you heard that the Defendant was complaining that he wished to testify at trial, but hadn't done that, hadn't been able to do that because of being denied the opportunity by you, was when you read his affidavit in the PCRA Petition filed by Mr. Adams?

A That's correct. To my recollection, I have no recollection of any other complaints.

Q As you sit here today, isn't it true that your testimony is not that you dropped the ball in any way, in terms of advising the Defendant of his rights, but merely that you don't know what you said to him?

A That is absolutely correct.

MS. SWEENEY: I HAVE NOTHING ELSE.

MR. ADAMS: JUST A FEW BRIEF QUESTIONS.

REDIRECT EXAMINATION

BY MR. ADAMS:

A Mr. Newman, do you recall that when you reviewed the Defendant's testimony in Mr. Barret's trial, that the Defendant's testimony was exculpatory for himself?

A I believe that's true. Yes.

Q And isn't it also true that his testimony in Barret's trial was consistent with the Defendant's testimony at Barret's preliminary hearing?

A I can't say for sure. I don't know if there were any more discrepancies. I can't really answer that question.

Q Okay.

A But I remember they were both exculpatory. Whether or not they were thorough, certainly I just can't - - I just can't answer that.

Q Isn't it true that the statements that you may have made in your closing argument to the jury with regard to the question of the Defendant testifying or not testifying did not necessarily reflect the literal truth of who made that decision or how that decision was made?

MS. SWEENEY: OBJECTION, YOUR HONOR. THE STATEMENTS SPEAK FOR THEMSELVES. FIRST OF ALL, IT'S A LEADING QUESTION, AND SECONDLY, IT'S CROSS

EXAMINATION.

THE COURT: SHE'S CORRECT.

WHY DON'T YOU REPHRASE IT?

MR. ADAMS: YES, YOUR HONOR.

THANK YOU, YOUR HONOR.

Q Do you remember today, when we're sitting here, whether or not the statements you made in the closing argument were meant to represent the literal truth concerning the issue of the Defendant testifying or Defendant not testifying?

MS. SWEENEY: OBJECTION

THE COURT: WHAT'S THE OBJECTION?

MS. SWEENEY: PARDON ME?

THE COURT: WHAT WOULD BE THE OBJECTION?

MS. SWEENEY: THE WORDS SPEAK

FOR THEMSELVES. THE COUNSEL SAID NOW, ALL THESE YEARS LATER, I DON'T RECALL. I DON'T RECALL. I DON'T RECALL. THAT'S BEEN THE BASIS OF HIS TESTIMONY

I'M NOT GOING TO BE ARGUING TO YOU THAT THE WORDS HE USED AT THE TIME HE USED THE, AND THE PLAIN MEANING OF THE WORDS BACK THEN SHOWS SOMETHING FAR DIFFERENT FROM WHAT DEFENSE COUNSEL WILL BE ARGUING TO YOU ON BEHALF OF THE DEFENDANT.

THE COURT: WHAT I'M GOING TO BE DOING IS LET THE WITNESS

ANSWER, IF HE COULD, AND LET'S SEE HOW FAR WE GO WITH THAT QUESTION.

GO AHEAD. YOU WANT IT REPEATED?

Q Well, I'll try to.

Do you recall whether or not your statements in closing arguments, the statements we're talking about, were meant to reflect the literal truth at the time?

A I can't really answer that. I don't recall, because, again, I don't recall what the specific discussions were. I can say that I don't think that, you know, the decision whether or not, whether a client testifies is, um - -

MS. SWEENEY: OBJECTION, YOUR HONOR, AND MOVE TO STRIKE.

IT'S NOT RESPONSIVE FROM THIS POINT FORWARD.

THE COURT: YES, I'M AGREEING TO THAT. YOU DID INDICATE THAT YOU DON'T RECALL. AM I CORRECT?

THE WITNESS: THAT'S CORRECT, YOUR HONOR.

THE COURT: YES.

MR. ADAMS: ALL RIGHT.

Q Either before the trial, during the trial, or after the trial, did you ever have any conversations with this Defendant's grandmother, a lady by the name of Sophie Martin?

MS. SWEENEY: OBJECTION.

THE COURT: WHAT'S THE OBJECTION?

MS. SWEENEY: IT'S CERTAINLY BEYOND THE SCOPE OF ANY CROSS EXAMINATION.

THE COURT: IT IS BEYOND THE SCOPE. IS THERE ANYTHING THAT YOU – THE GRANDMOTHER? CONVERSATIONS?

MR. ADAMS: WELL, I'M GOING TO SPECIFY IN A MINUTE. FIRST OF ALL, I WANT TO FIND OUT WHETHER THERE WERE ANY CONVERSATIONS.

THE COURT: LET'S FIND OUT WHERE YOU'RE GOING WITH IT.

A Yes.

Q Did Mrs. Martin, the Defendant's grandmother –

MS. SWEENEY: OBJECTION FOR ONE OTHER REASON. WE'RE NOW TALKING ABOUT SOMEBODY OTHER THAN THE DEFENDANT. IS MRS. MARTIN IN THE COURTROOM?

MR. ADAMS: NO, SHE'S NOT.

MS. SWEENEY: THANK YOU.

THE COURT: IS MRS. MARTIN THE GRANDMOTHER?

THE DEFENDANT: YES

THE COURT: OKAY.

MR. ADAMS: YES.

Q Did Mrs. Martin ever talk to you about George testifying–

MS. SWEENEY: OBJECTION.

Q – One way or the other?

MS. SWEENEY: OBJECTION.

THE COURT: I'LL ALLOW A "YES" OR "NO."

A I don't recall her addressing that with me. Whether she did not, I cannot say.

Q Have you ever in your practice persuaded a client who initially said he wanted to testify in his own defense, persuaded him not to testify?

MS. SWEENEY: OBJECTION.

MR. ADAMS: WELL, YOUR HONOR, THAT WAS BROUGHT OUT A GREAT DEAL.

THE COURT: OKAY. LET'S SEE WHERE WE GO WITH IT.

A If you can allow me a minute to think, I'm going to try to think if I can ever recall doing that.

(WHEREUPON, THERE IS A PAUSE IN THE PROCEEDINGS.)

A I can't recall ever persuading someone who asserted as a fact that they wanted to testify, affirmatively stating as a fact that they wanted to testify vigorously, trying to convince them not to. If I were going to try to do that, it would have been in my office or up at the prison, but if it were at trial at that point in time, um, if it weren't a fairly done deal, if it weren't fairly well decided that he was or wasn't, I wouldn't do that.

And in this case, I think only, given the opening statement I made, I think it was still up in the air. It wasn't a definite thing, but to answer your question specifically, if someone asserted as a fact that they wanted to testify, and they intended to testify, at that point, no. I wouldn't prevent them, because I know what the obvious result would be.

Q You testified on cross examination by Miss Sweeny that in many cases the actual way that the advice would be given would be simply for you to turn to the defendant at counsel table and say, "I think you shouldn't testify," or "I'm not going to put you on the stand," or words to that effect?

A A lot of possibilities, but, essentially, that, and usually that's the very final last word on the issue. It's like this is our last chance, and often it's that quick. It's just a whisper, a quick turn to the client saying, "no sense in you taking the stand; do you agree?" And, hopefully, the client saying, "yeah," or acquiescing, something to that effect, and I'm only suggesting a variety of words. There might be a whole variety of words that I might use. It might be, "I don't think you need to take the stand." "You shouldn't take the stand," you know. "You don't need to take the stand." I mean, I can't tell you. Again, from case to case, if a tentative decision has been made, there will be a last moment when I'll turn to the guy and say, "You're not going to take the stand," and it may be in the form of an interrogatory. It may be a little more emphatic than that. Again, it depends on the client or the case.

There are clients, for example, who say to you, "you decide, Mr. Newman." I mean, I have that a lot of times. "What am I paying you money for? You make the decision."

MR. ADAMS: NO FURTHER QUESTIONS.

RECROSS EXAMINATION BY MS. SWEENEY:

Q But your testimony is you always turn to the defendant before you rest your case and ask the defendant at least one last time if he wishes to testify. Isn't that true?

MR. ADAMS: OBJECTION

THE COURT: WHAT' YOUR OBJECTION?

MR. ADAMS: BUT THAT'S NOT WHAT HE TESTIFIED.

A Sometimes it will be in the form of an interrogatory. Sometimes it will be in the form of a statement. There's a variety of ways that it's done, and again, it depends on the client how I deliver it.

Q My question is, that what you're telling us is that always you consult with the defendant in some manner, be it interrogatory or statement, to obtain the defendant's wish before standing up and announcing to the court that the evidence is complete without the defendant testifying?

A I can't say "his wish". If you ask me do I always make a statement to the defendant, be it in an interrogatory or declaratory form about testifying, yes, I do.

Do I ascertain what his real desire is? You know, "wish"; when you use that phrase, that's impossible for me to answer. Whether or not there's even a response from the defendant, other than – it could be anything from an affirmative to a grunt. I mean, it depends on the client, again, what kind of response I'm getting.

Q But you get a response from the defendant before you rest the case; isn't that true?

A Yes. Yes, that is accurate. That's true.

Q Because the defendant's decision, as you well know, is what's controlling in the case. Isn't that true?

MR. ADAMS: I OBJECT TO THAT QUESTION. I THINK IT'S ARGUMENTATIVE.

THE COURT: I THINK WE'VE WENT OVER THIS ENOUGH.

MS. SWEENEY: I HAVE NOTHING ELSE.

THE COURT: SO, COULD WE EXCUSE MR. NEWMAN?

MR. ADAMS: YES

MS. SWEENEY: I'M RELUCTANT TO EXCUSE MR. NEWMAN, SINCE I

DON'T REALLY KNOW WHAT THE DEFENDANT WILL SAY THAT WILL INVOLVE MR. NEWMAN OR POSSIBLY A REBUTTAL BY MR. NEWMAN.

THE COURT: WHY DON'T – I DON'T WANT HIM UNNECESSARILY JUST STAYING AROUND HERE. HOW LONG WILL YOU BE ON YOUR DIRECT, MR. ADAMS, WITH YOUR WITNESS?

MR. ADAMS: HONESTLY, I THINK IT WILL TAKE APPROXIMATELY AN HOUR, YOUR HONOR, BECAUSE HE ALSO HAS TO TESTIFY. HE'S NEVER TESTIFIED IN HIS OWN DEFENSE. SO, HE HAS TO TESTIFY.

THE COURT: I REALLY DON'T WANT MR. NEWMAN TO WAIT AROUND FOR AN HOUR JUST IN CASE, BUT I'M AWARE OF WHAT YOUR SITUATION IS. MAYBE WE CAN GET SOME KIND OF MIDDLE GROUND THAT IN THE EVENT YOU NEED –

THE WITNESS: I'LL RETURN TOMORROW, IF YOU WISH TOMORROW. I'VE GOT THREE MATTERS LISTED, BUT I DON'T THINK ANY OF THEM WILL ACTUALLY GO TO TRIAL. IF YOU WISH ME TO COME BACK AT SOME TIME TOMORROW.

THE COURT: I DON'T KNOW

WHAT EACH OF YOUR SITUATIONS ARE TOMORROW.

THE COURT: I DON'T KNOW WHAT EACH OF YOUR SITUATIONS ARE TOMORROW.

MS. SWEENEY: I CAN MAKE MYSELF AVAILABLE.

MR. ADAMS: I HAVE AN EXTRADITION HEARING IN DELAWARE COUNTY.

THE COURT: I HAVE A TRIAL, TOO.

MR. ADAMS: I WOULD CERTAINLY WANT TO DO THIS.

THE COURT: WE'RE JUST ASSUMING THAT IT'S NECESSARY, BUT I THINK MAYBE YOUR CROSS

EXAMINATION IS VERY THOROUGH, WE TURNED OVER EVERY UNCOVERED STONE.

MS. SWEENEY: I HAVE TO KEEP THAT OPTION, THOUGH.

THE COURT: YES. ALL RIGHT. YOU WANT TO CALL YOUR WITNESS?

MR. ADAMS: GEORGE TRUDEL.

THE WITNESS: GEORGE TRUDEL.

G E O QUESTION G E T QUESTION U D E L:

WHEREUPON THE WITNESS IS HEREBY SWORN AND TESTIFIES UNDER OATH AS FOLLOWS:

DIRECT EXAMINATION BY MR. ADAMS:

MR. ADAMS: MAY I PROCEED, YOUR HONOR?

THE COURT: YES.

Q Mr. Trudel, how old are you, sir?

A Thirty years old.

Q And how far did you go in school?

A Tenth grade.

Q And how old were you when you stood trial in the jury trial in this case, in December 1988? It was roughly nine years ago. So, were you 20?

A Twenty.

MS. SWEENEY: I OBJECT TO THAT. MY RECORDS INDICATE HE WAS 22.

Q Well, what is your birthday?

A 5/26/66.

Q 5/26/66?

MS. SWEENEY: I THINK WE CAN AGREE THE TRIAL WAS –

THE COURT: WHATEVER IS IN THE RECORD.

Q Mr. Trudel, where did you live in November of 1996?

A 4242 Griscom Street.

Q In the City of Philadelphia?

A Yes.

MS. SWEENEY: JUDGE, I OBJECT TO THIS BECAUSE I SUGGEST THAT IT'S FAR AFIELD OF THE PURPOSE THAT WE'RE HERE FOR, WHICH IS A LIMITED ONE.

THE COURT: WHY DON'T WE GET

TO THE BASES, THE PURPOSE OF THE APPEAL AND REMAND?

MR. ADAMS: I WOULD, BUT I WOULD SAY THIS FOR THE RECORD. I DO THINK THAT THE DEFENSE AND DEFENDANT IN THIS KIND OF A SITUATION DOES HAVE THE RIGHT AND SHOULD HAVE THE RIGHT TO ACTUALLY GIVE HIS TESTIMONY, BUT I WILL SKIP AHEAD TO AFTER HE WAS ARRESTED.

THE COURT: INSOFAR AS THE SUPERIOR COURT ACTUALLY REMANDED THIS CASE FOR A SPECIFIC REASON, WHY DON'T WE RELEGATE IT TO THAT SPECIFIC

REASON, SO WE CAN SATISFY THE SUPERIOR COURT'S REQUEST.

MR. ADAMS: OKAY. LET'S DO THAT. I WILL DO THAT.

Q George, approximately when were you arrested and charged in connection with this case?

A It wasn't – it wasn't too long after Bobby Barret's trial.

Q Okay. And if I told you that Mr. Barret's trial took place in the summer of 1987, would that be –

A I'd say almost a year.

Q In any case, after you were arrested and charged in this case with the death of Mr. Baroik, did you have counsel appointed for you?

A Before?

Q Did you have counsel appointed to represent you -

after you were arrested in this?

A Yes.

Q And was that Mr. Newman?

A Yes.

Q The man that just testified here in court here?

A Yes, it was.

Q Did you have an opportunity to meet with Mr. Newman?

A Yes.

Q Approximately, where and when did you first meet with him?

A I forget where his office was because my grandmother drove me at the time.

Q Was it at the Benjamin Franklin Hotel?

A I guess.

Q But you went to his office?

A Yes.

Q Did he interview you at that time, the first time you were together?

A Briefly.

Q Now, did you see him then, again, after that time before the trial started?

A Briefly

Q Is it fair to say that you met with Mr. Newman on a number of occasions? Although they may have been brief, you did meet with him a number of different times?

A Yes, I did.

Q Did you ever tell him what happened on the night of the crime, November 14th, 1996?

A Yes, I did.

Q And briefly, what did you tell Mr. Newman that you did with respect to the victim that night?

MS. SWEENEY: JUDGE, I OBJECT.

THE COURT: IT IS GOING FAR AFIELD. I'LL ALLOW IT TO A CERTAIN EXTENT, BUT THAT WASN'T THE WHOLE PURPOSE, BUT GO AHEAD.

Q Briefly.

THE COURT: KEEP THAT AREA BRIEF.

Yes

A that I witnessed the fight between Casmere and Baroik, (PHN) and Baroik and Bobby Barret?

Q And did you tell Mr. Newman what you did other than witnessing it?

A Yes.

Q What was that?

A How did Bobby get away from him.

Q Now, do you recall ever talking with Mr. Newman about the subject of your testifying at your own trial?

A Yes, I did.

Q Can you tell the Judge when, approximately, when and where that conversation may have taken place?

A I talked to Mr. Newman about it at his office on the phone one time when he called, and I talked to him about it in the Courtroom.

Q And, if you can, to the best of your recollection, what did you say to him about it? What did you say to Mr. Newman?

A About testifying?

Q Yes.

A That I wished to testify on defense. I told him, I testified at Bobby's trial.

Q What did he say to you?

A He told me, I'd more than likely would testify at my own trial.

Q Did you testify at the trial?

A No, I did not.

Q What happened during the trial with respect to that question, whether or not you were going to testify?

A Well, they put Bobby Barret on the stand. Um, I sat at the table and listened to everybody that the DA's Office put on. They called Bobby Barret for ms. I was waiting for Newman to call my grandmother and to call me.

As soon as Bobby Barret was done testifying, at that time, Mr. Newman told me that, you know, he's not going to put my grandmother – he's not going to put me on. He told me he would cover it in his closing. He told me the jury will not agree with Colleen DeMarco, and that was it.

Q And where did this conversation take place that you just related?

A At his closing, toward the end of the trial.

Q In the courtroom?

A Yes, sir.

Q Or in some other room?

A Courtroom.

Q And where were you sitting? Where were you sitting?

A I was sitting next to him at the table.

Q Was this conversation during a recess of the trial, or was it during the time when the trial was actually - -

A The trial was actually in progress.

Q What, if anything, did you say to him when he told you that he was not going to put you on the witness stand?

A I didn't say anything. I thought that was it.

Q Did you know, then, in December of 1988, that it was your right to testify, and only you could make that decision?

A No, sir.

Q Did Mr. Newman know that you had testified at Mr. Barret's trial?

A Yes, he did.

Q How do you know he knew that?

A I had told him. He had the paperwork.

Q He had the transcript of the testimony?

A Yes.

Q Did you and he ever go over that testimony before your trial started? Did you ever review your testimony at Mr. Barret's trial with Mr.

Newman?

A In telling him what happened that night, the testimony, I did.

Q Before your trial started or even during your trial, did Mr. Newman ever tell you what questions he might ask you if he put you on the witness stand?

A Not really, that I remember.

Q But it's your testimony that when you trial started, when it commenced, you thought you were going to testify?

A Yes, I did, and I thought my grandmother was going to testify, also.

MS. SWEENEY: OBJECTION TO ANY QUESTIONS ABOUT THE GRANDMOTHER? THAT'S NOT THE ISSUE WE ARE HERE FOR.

MR. ADAMS: YES. THAT IS NOT THE ISSUE, BUT THAT IS TRUE.

Q When Mr. Newman told you in the court that they weren't going to put you on the stand, what happened after that, if you remember?

A He just started closing. His closing.

Q Did you object or raise your hand or say anything to the Judge at that time?

A No, I didn't.

Q Did you know that you could have objected?

A No.

Q Did you ever meet with or talk with a lawyer by the name of John Scott.

A. No, I didn't.

Q Do you know who he is?

A He was supposed to be my lawyer. He was paid to be my lawyer.

Q But did you ever have any contact with him of any kind?

A Yes. I received a receipt telling me that he's been retained. That was it.

MR. ADAMS: EXCUSE ME ONE MINUTE, YOUR HONOR. I MAY BE FINISHED.

I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: OKAY, CROSS.

CROSS EXAMINATION

BY MS. SWEENEY:

Q Mr. Trudel?

A Good Afternoon.

Q When, at 22 years old, you went to trial in this case being charged with killing somebody, you were a veteran of the criminal court system here in Philadelphia. Isn't that true?

A I wouldn't say veteran.

Q Well, you had four previous nonjury trials before the trial of this case. Isn't that true?

A Okay.

Q That's a "Yes"?

A Yes.

Q In fact, they started in 1984, when you had a nonjury trial for simple assault, resisting arrest. I'm sorry, simple assault, recklessly endangering, criminal mischief and possession of an instrument of crime; weapon, before Judge Krase.

Q At that point in November of '84, you were represented by somebody from the Public Defender's Office. Can you remember that arrest and going to trial and being found guilty and getting probation?

A No, not particularly.

Q That's when you were 18?

A (The witness shakes his head No.)

Q then you had a case of retail theft when you were arrested in 1987, and in August of 1987, before your December of 1988 trial, you went to trial before Judge Gilbert for retail theft, and you were represented by somebody named Theodore Weiss. Can you remember that?

A What was the case?

Q Retail theft and conspiracies?

A No, I don't remember.

Q You don't remember that one?

A No.

Q How about the burglary case where Mr. Newman represented you, where you went to trial in July of 1988, just five months before this trial? Do you remember that case?

A I think that was the case where I was asleep in a car.

Q And that was another waiver trial. You didn't plead guilty. You had an actual trial, and you went to Court, and you were found not guilty. Correct?

A In that case, I think, um, the p0erson that they had put on the stand had said that I didn't have anything to do with it. Brian – I forget his – Brian Brown.

Q And you were found not guilty at the trial, is my question. Isn't that right?

A Yes, Ma'am.

Q then you had another case, which was a drug case, in April of 1988. You went to trial, another waiver trial, and you were represented by Harvey

Anderson. Do you remember that you were found guilty and got a year's probation before Judge Conroy? Do you remember going to court for a drug case?

A No.

Q It's your testimony, Sir, as you sit here today, that after four trials, four trials, not one attorney ever had said to you the decision whether to testify is yours?

A No.

Q No one?

A I was always told what to do.

Q No one ever told you specifically that you have the right to decide whether to testify?

A Specifically, No.

Q How about when Judge Savitt instructed members of the jury at the start of the case here on December 6th of 1988 as follows: Page 14. You were present. By the way, you were in the Courtroom; you listened to the Judge explain to the members of the jury the ground rules of his introductory remarks before the testimony started, weren't you?

A I guess I was

Q You were paying attention, closely, because you knew you could go to jail for the rest of your life if you were convicted, didn't you?

A I guess I was.

Q Well, a guess is not an answer. Do you remember sitting there and listening to Judge Savitt tell the members of the jurors, "You've been selected now. Now, I'll tell you what to expect," and he gave a little bit - -

A Ma'am, can I say something?

Q "This is the Commonwealth. This is the Defense."

A It's years ago. I had never been in any kind of trouble like that, all right? I was basically legally illiterate. He was saying things, you know, um, legal terms and whatnot. When I was sitting up there, a lot was going on for me.

I don't actually remember what was being said, nor did I understand at the time what was being said. To this day, I still don't understand a lot of what's being said legally.

Q Did you turn to your lawyer, Mr. Newman, during any of the trial and say, "I don't understand"?

A Some things.

Q Did you every say to him, "I don't understand the Judge's comment about testifying"?

A No. He did a lot of writing. I didn't bother him. I let him do his job.

Q Page 14. Do you remember hearing the Judge say:

> "Tell me if you don't understand this. After the Commonwealth's case is over, the Defendant's lawyer may present evidence for the Defendant. The Defendant has no obligation to offer evidence or to testify himself,".

Is there anything about that that you don't understand?

A I don't remember.

Q Now, as you sit here today, is there anything you don't understand, Sir?

A About that now?

Q Right.

A No.

Q Okay. How about these comments:

"Under the law, every Defendant is presumed innocent and has the right to remain silent. The burden is on the Commonwealth to prove him guilty beyond a reasonable doubt".

Did you understand that, Sir?

A Yes, I understand it now.

Q How about these words, "Of course, if the Defendant does choose to testify - - Now, it doesn't say Defense Counsel. It says Defendant.

"If the Defendant does choose to testify, or offer evidence in his own behalf, then the Assistant District Attorney may cross examine those witnesses".

Is there anything about that that you don't understand, Sir?

A No.

Q Now, do you remember hearing Judge Savitt explain that to the jury before your trial started?

A (Whereupon there is no response.)

A “No”?

A No, Ma’am.

Q Did you hear your lawyer open to the members of the jury and say, “We haven’t decided yet if George is going to testify”?

A I don’t remember.

Q Did you hear your lawyer tell the members of the jury, “George elected not to testify”?

A No.

Q You didn’t hear him say that?

A No.

Q Sir, you were sitting in the courtroom for closing arguments, weren’t you?

A I don’t remember that.

Q Did you listen to your lawyer when he, in essence, pled for your life? He was trying to get you released from jail and back to the streets. Didn't you listen to him when he talked to the jury?

A I wasn't really here.

Q That's a "No," you didn't listen?

A No.

Q When the case was concluded and you were convicted of second degree murder, you were sentenced on the spot, weren't you, Mr. Trudel?

A Yes, I was.

Q And the Judge said, "I don't even have any discretion here. The law says second degree is life," they put the cuffs on and out you went, right?

A Yeah, I was in shock during the whole trial.

True. It's like the whole thing was like a dream to me. It didn't even feel like I was in the courtroom.

Q Sir, when the Judge said, "You're going to jail for the rest of your life" - -

A I had no emotion.

Q That's not my question. You can volunteer whatever you want to volunteer. My question is, you must have been pretty darn mad if what you wanted to do was get on that witness stand and testify, and your lawyer wouldn't let you. Weren't you mad?

A I didn't understand what was going on, really.

Q You understood you were going to jail for the rest of your life, didn't you?

A It was explained to me that, that life wasn't life.

Q Who explained that, sir?

A Mr. Newman.

Q When did he do that?

A He was sitting at the table. Um, I couldn't stand up any more after they polled the jury. I had to sit down. Um, he was just - - I just remember him saying things into my ear. "Don't worry, um, life isn't life. There's always commutation." He's always saying things to me.

Q So, you didn't speak up and say anything to the Judge because you didn't think that life was life?

A I didn't know I could.

Q You could talk, right?

A Yeah, I could talk.

Q There was nothing preventing you from talking that day, was there?

A No, there wasn't. Nothing preventing other than not knowing that I could.

Q Sir, if you thought you were wrongfully convicted and denied of an opportunity to testify and tell the jury, when the Judge said, "Is there anything else?" Did anything prevent you from standing up and saying, "Yes, there is something else I wanted to talk about"?

A I don't remember anybody asking me anything.

Q Did you listen to the charge of the Judge when he told the members of the jury how to evaluate the evidence in your case?

A Not that I remember.

Q This was the law that the jury was going to use to decide whether you were innocent or guilty. Didn't you pay attention?

A I was up all night. No

Q That's a "No," you didn't pay attention?

A No.

Q So, the Judge could have said - -

A I mean, I made - -

Q He could have said Green Cheese, you wouldn't have know?

A I paid attention to the best of my ability at that time.

Q Sir, when the evidence was concluded and the jury was charged, you were still on bail at that point, weren't you?

A I guess. Yes.

Q Not "I guess". Weren't you on bail?

A I said Yes.

Q Pardon me?

A Yes.

Q And when you were on bail, your lawyer, Mr. Newman, asked the Judge for permission to release you to his custody. He said he would take responsibility for you. Isn't that - -

A I don't remember

Q Do you remember the Judge saying, "Okay, Mr. Newman," at about Page 563 in the record that day?

"Okay, Mr. Newman, if you tell us that the Defendant will stay with you, we won't make the Sheriffs lock him up now that the jury is out." Do you remember that?

A No Ma'am.

Q Do you remember the court saying the Defendant is required to be present in this room until we recess and back by 9:30 tomorrow morning?

And this is age 563, and Mr. Newman says, "He'll be there."

And you say, "Yes, Your Honor." Do you remember speaking to the Judge then?

A I remember waiting while the jury was sequestered, bu t I don't recall what was said.

Q You don't remember the Judge speaking to you, and you had an opportunity to state to him if you had a legitimate complaint?

A I'm just saying I don't remember what he was saying.

Q Do you remember at all listening to the Judge's charge when you came - - Now, you knew as you sat there during the Judge's charge, it's your testimony that you had wanted to testify and had been denied the opportunity to do that, right?

A I was told not to.

Q That's not my point. As you sit here, what you're telling us is you affirmatively wanted to testify, and Mr. Newman prevented you from doing that. Isn't that what you're telling us?

A You know, I listened to my lawyer. I listened to what the lawyer told me.

Q The lawyer told you it was not his recommendation for you to testify. Isn't that correct?

MR. ADAMS: I OBJECT TO THAT QUESTION.

THE COURT: WHY DON'T YOU REPHRASE THAT?

Q The lawyer told you that he did not think it was a good idea for you to testify. Isn't that true?

A He just said, "I'm not going to put you on."

Q Well, then, I go back to my last question which was, as you sat there waiting for the jury to decide whether you're going to spend the rest of your life in jail, you knew you had wanted to testify and the lawyer wouldn't let you. Isn't that true?

A Yes.

Q Correct?

A I didn't get on the stand.

Q No, that' s not the point. The lawyer wouldn't let you testify. That's what you're asking us all to believe. True?

A True.

Q Didn't you listen to the Judge talking about your right to testify when he explained the law to the jury and told the jury at page 521:

> "In this case defendant did not take the stand to testify.".

Didn't your ears perk up then?

A I was never told I had the right to testify.

Q I'm going to continue on that regard, Sir. So, my question was, when you heard the Judge telling the members of the jury in this case the defendant did not take the stand to testify, didn't you sit up a little brighter in the chair and say, "hey, wait a minute. I wanted to testify"?

Didn't you pay closer attention to the Judge's charge then?

A No Ma'am.

Q Not at all?

A (The witness shakes his head No.)

Q Did you hear the Judges next comment: "It is entirely up to the Defendant, not defense counsel, defendant, in each criminal trial whether or not to testify."?

Did you hear the Judge tell that to the members of the jury before you were convicted and sentenced to life in prison?

A I don't remember, Ma'am, No.

Q When did you realize, hey, wait a minute, it was my right to decide that I should have testified?

A It wasn't until later on, until somebody started advising me, until I started looking into legal work, and to learn about it. I never knew I had the right to testify.

Q Well, that's not my question, Sir. When did you realize –

A I don't remember the date.

Q – that it was your right?

A I don't remember the date.

Q It wasn't during any of the years that George Newman represented you on appeal for this case, was it?

A During my appeal with George Newman, I had just been transferred to Camp Hill and was caught in a riot. I lost all my legal work. I had no communication or contact with my family, whatsoever.

MS. SWEENEY: MAY THIS WITNESS BE SHOWN WHAT WE'VE MARKED AS COMMONWEALTH EXHIBITS C-2 AND THEN C-4, PLEASE? C-2 IS THE HANDWRITTEN LETTER AND C-4 IS THE FOUR SETS OF PLEADINGS. TWO SETS OF PLEADINGS.

Q Mr. Trudel, you wrote C-2, didn't you? It's a xerox copy, but isn't that your handwriting?

A Yes.

Q You wrote to Mr. Newman?

A Yes, but I don't remember when I wrote it.

Q Well, would you take a look at what we marked C-3, a letter dated February 8, '89, and see if you remember receiving that back from Mr. Newman addressing whether or not you could get commuted and how much time you'd have to do?

A All right.

Q Would you tell us, please, when Mr. Newman, according to you right now, turned to you and said, Don't worry about Life. You don't have to do life. It will be all right?

Why didn't you write and say, how many years exactly do I have to be sentenced to, and when am I eligible for parole after the trial?

A He said that to me at the end of the trial.

Q At the end of the trial. It's your testimony he told you it isn't life, don't worry about it or words to that effect?

A Not word-for-word as you're stating, but it was something to that effect. I mean, you know, I heard people talking. He was talking in my ear. I wasn't hearing what he was saying, but it was to that effect. Yes.

Q Were you a little surprised when you got the letter dated February 8th of 1989 that says, "No specific minimum on a life sentence. You're not eligible for parole until the Governor commutes"?

A Yes, I see.

Q Well, you got the letter, didn't you?

A Yes.

Q It was addressed to you. When you got the letter, were you surprised, "Wait a minute now. I may be in here for awhile"?

A Even up to this day, people in Pennsylvania don't even know life is life.

Q That's not my question, and I would appreciate you trying to answer them as best as you can.

Weren't you surprised, according to you, when Mr. Newman said, "Hey, you're going to be there.

We don't know who's going to commute what. Life is Life, according to you, in Pennsylvania." and then you tried to look for issues to try to get you out of jail or try to get you a new trial.

A My life was taken away from me for a crime I never committed.

Q Is that a "yes" or "No"?

A Yes

Q You had access to either a law library, and a friend of yours had access to a law library in the prison, because you came up with additional matters to be complained of on appeal; A and B. Do you remember that? Do you have them in front of you?

A Yeah. I didn't know anything about the law, and I ran through a series of jailhouse lawyers.

Q Well, the series of jailhouse lawyers, either you typed it or they did, and came up with three papers talking all about the weaknesses in the Commonwealth's case and how detectives took away your Fifth and Sixth Amendment rights, and in Ryan Wynville and various other cases that are cited here, true?

A Yes.

Q And they did this based upon what you told them had happened in your trial, didn't they?

A Things that I never go to say.

Q Sir, you told your friends with access to law books what happened in your trial, and that's what they used to prepare 4-A. Isn't that true?

A Not just what happened in my trial, what happened before the trial.

Q And that's also what they used for this long six page, seven page, whatever it is, pleading in the case of Commonwealth Vs. Trudel. In 4-B appears the most tragic and realistic example of precisely what miscarriage of justice entails. Correct? That was prepared with your assistance by your friends?

A No, not with my assistance. Just by me telling him what -

Q Well, you helped him, didn't you?

A I didn't put it together.

Q You told him what happened, and he put together these papers?

A That was it, Yes.

Q You never told him, "and I wanted to testify, and my lawyer wouldn't let me," did you?

A I didn't know that was an issue.

Q Sir, didn't you know you were frustrated?

A (No response.)

Q Whether it is or isn't, didn't you know as a person you had wanted to testify, and he wouldn't let you?

A Excuse me. Excuse me.

MR. ADAMS: GEORGE, LET MISS SWEENY FINISH HER QUESTION BEFORE YOU TRY TO ANSWER. THAT'S THE WAY WE DO IT. ONLY ONE PERSON.

A Whether I was frustrated or not, I still didn't know I had the right to testify.

Q Did you say to anybody trying to help you, "I wanted to testify," to give them a chance to tell you what the law was?

A Anybody?

Q Anybody through at least 1990, two years after your conviction, two years after your conviction?

A I don't remember.

Q Weren't you trying to be as helpful as possible to your friends in the hope that this tremendous miscarriage of justice you suffered could be remedied?

A First, excuse me. Um, they weren't my friends. They helped me with this legal work. They were just, um, a guy that was working in the law library, and I had just fallen in the institution, and as I was getting help from these guys, I had other people telling me not to trust the jailhouse lawyers and whatnot.

Q Well, you trusted him enough with things about Colleen DeMarco and your Fifth and Sixth

Amendment Rights being infringed by police, right?

A I didn't know about it.

Q But you didn't trust him enough to tell him you really wanted to testify, and your lawyer wouldn't let you?

A It's not like they went into a lot of detail.

Q I repeat my question. When did you learn the law says it's your right to decide whether to testify?

A I'm not exactly sure when I learned.

Q Well, you learned it at some point before Mr. Adams filed an affidavit in which you said I wanted to; my lawyer wouldn't let me. Right?

A Some time, but I don't know exactly when.

Q Sir, you're seeking relief in this case on the single issue now of whether you testified or not and whose decision it was.

Are you telling us you can't remember when lightening struck, and you realized it's your right to decide?

A Whether it was discussing it with an inmate or lawyer, I'm not sure at what point.

Q Was it while George Newman was representing you?

A No.

Q Your recollection is better than Mr. Newman's that you discussed your testifying or not with him three times; at his office, on the phone and in court. Correct?

A It may have been more than three times.

Q So, at least three times, Correct?

A Correct.

Q At his office being before trial started?

A I've seen him in his office a few times.

Q I mean, in terms of this discussion and whether you wanted to testify or not, was that before trial started?

A Yes, Ma'am.

Q What about the phone conversation? You remember, was that before trial or during trial?

A That was before trial.

Q And as of that time, was it your understanding, as Mr. Newman said to the members of the jury, "we haven't decided yet," as to whether you were going to testify?

A Excuse me?

Q Isn't it true that as of the start of the case, as Mr. Newman said to the jury, that you and he hadn't decided whether you were going to testify or not, true?

A True.

Q You were going to wait and see how Bobby Barret did in the cross examination of Colleen DiMarco?

A I wasn't going to wait. I thought I was going to testify, but Mr. Newman was speaking for me.

Q Well, did you hear Mr. Newman say to the members of the jury, in his opening say, "We haven't decided"?

A No I don't recall that.

Q So, you didn't hear that. What did you discuss at this first meeting in his office before the trial about you testifying?

A I just - - he hadn't talked to me about what had happened that night. I had told him what happened that night. I had told him what happened that night. I had told him that I testified at Bobby's trial. He came up with, I more than likely will be testifying at my own trial.

Q Did he go over with you what you would say, how you would say it, to give you practice?

A I don't remember if that's what he went over, but I remember he was asking me questions about the night, and I was just telling him things that happened and whatnot.

Q How about did you discuss it with him again after Bobby Barret testified?

A I don't remember.

Q Bobby Barret testified and said in your case, taking the heat: I did it. I didn't even see George Trudel out there that night. I just heard a voice I recognized as his.

Do you remember him saying that he came into Court to get you help?

A I don't remember him saying exactly that.

MR. ADAMS: BUT WE BELIEVE IT IS IN THE RECORD. I CONCEDE THAT IT IS IN THE RECORD.

Q If your testimony, according to your affidavit, is that you met Bobby Barret outside after the fight with the victim and walked up together to the apartment, would you agree that that's not what Bobby Barret said?

A I didn't meet Bobby Barret outside after the fight. I was standing in front of the apartment. Bobby Barret was walking back down the street. As he was walking back down the street, I turned to my grandmother and said, everything is fine. She went in the house. I went upstairs. He came back and came upstairs to the apartment after me.

Q So, it's your testimony today that what really happened is you went up first, and then Bobby

Barret came upstairs?

A Not actually after me. He was further up the street.

Q Well, you signed an affidavit and gave it to your lawyer as part of the pleadings in this case, didn't you, Sir, to try and explain why you suffered such a miscarriage of justice, dated June 17th, 1992. Do you remember that?

A No.

Q No? Do you remember at Paragraph 31/32, "Barret didn't chase Cos" - - That's the victim, Your Honor, " - - but instead walked slowly down Griscom Street to where I was standing in front of 4435. Barret and I went back into Beatty's apartment."

Did you tell your own lawyer that you and Barret walked up to the apartment together?

A I didn't, um, I don't know if I specifically said "together". I know I walked up the steps, because I was on the phone when Bobby was coming up the steps.

Q Well, Sir, did you sign an affidavit that says, "He walked up to where I was standing in front of 4436. Barret and I went back into Beatty's apartment"?

Did you sign an affidavit that says that?

A Which year?

Q Maybe it changes every year. 1992. June 17th of 1992.

MS. SWEENEY: CAN WE AGREE THAT THAT'S PARAGRAPH 32, COUNSEL? MAY I SHOW IT TO HIM?

Q But that's not the way you remember it now?

(Defense Counsel gives his copy to the Witness.).

A Okay. Well, I mean, I'm sure if I was up there ahead of time, he wasn't far behind. It wasn't - - it wasn't that big of a difference. It wasn't that important, really.

Q Time will tell.

Did Mr. Newman turn to you, before standing up and announcing that the evidence was closed, and saying words to the effect of okay, this is it; you want to testify or I don't think you should testify?

A He said, "I'm not going to put you on.

Q And what did you say?

A I didn't say anything.

Q Did you say, "Okay"?

A No.

Q Did you say, “I want to testify”?

A I didn’t say anything.

Q You said nothing? Did you nod your head?

A No. No, I just let him do his job. He said, I’m not going to put you on. I had asked him was he going to put my grandmother on. He said, Look, I told you don’t worry about it. I’ll cover it in my closing. He said, the jury will not believe Colleen DiMarco.

Q How many times did you tell Mr. Newman, according to you, that you definitely wanted to testify in this case?

A Numerous times.

Q Numerous? Four? Five? Six?

A I couldn’t give you an exact number.

Q Did he try to talk you out of testifying by discussing the strengths or weaknesses, or did it come right down to him saying, "I'm not putting you on"?

A He just said he didn't think it was a good idea to put me on, and that the jury - -

Q And then your said, "Okay"?

A and I asked him about my grandmother after that, and he told me, I'm not going to put your grandmother on.

Q When he said, the jury is not going to believe Colleen DiMarco; I don't think it's a good idea, did you say, "Okay"? Did you nod your head?

A I didn't answer. That was like 11 years ago. All I remember is that I let Mr. Newman run the show, and that's all I can tell you, honestly.

Q You trusted his judgment?

A Yes, Ma'am.

MS. SWEENEY: I HAVE NOTHING ELSE, YOUR HONOR.

THE COURT: ANY MORE DIRECT? YOU DON'T HAVE ANY MORE DIRECT, DO YOU?

MR. ADAMS: NO.

THE COURT: ALL RIGHT. THIS IS HEARING IS CLOSED. DO YOU HAVE ANY ARGUMENT? YOU'RE NOT GOING TO BE PRESENTING ANY?

CERTIFICATE OF SERVICE

F. Kirk Adams, Esquire, Counsel for Petitioner, hereby certifies that he served a copy of the within Appendix On Petition For Writ of Certiorari to the United States Court of Appeals for the Third Circuit, No. 00-1099 on the attorney for the Commonwealth of Pennsylvania, Deputy District Attorney, Donna G. Zucker, Esquire, Chief of the Federal Litigation Department of the Philadelphia District Attorney's Office at 1421 Arch Street, Philadelphia, PA 19102, by U.S. Mail, postage prepaid, on the date set forth below.

Date: 7-30-01

Kirk Ada
F. Kirk Adams, Esquire